S. HRG. 109–914

THE ENDANGERED SPECIES ACT AND INCENTIVES FOR PRIVATE LANDOWNERS

HEARING

BEFORE THE

SUBCOMMITTEE ON
FISHERIES, WILDLIFE, AND WATER

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

JULY 13, 2005

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ONE HUNDRED NINTH CONGRESS

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C O N T E N T S

ADDITIONAL MATERIAL

HEARING ON THE ENDANGERED SPECIES ACT AND INCENTIVES FOR PRIVATE LANDOWNERS

WEDNESDAY, JULY 13, 2005

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND WATER
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m. in room 406, Senate Dirksen Building, Hon. Lincoln Chafee (chairman of the subcommittee) presiding.

Present: Senators Chafee, Clinton, Inhofe, Jeffords, Murkowski, DeMint, and Vitter.

Senator CHAFEE. Good morning.

We will open the Senate Subcommittee on Fisheries, Wildlife and Water of the Senate Committee on Environment and Public Works.

I will turn to Chairman Inhofe for an opening statement.

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. I appreciate that very much.

We have a conflict in the Armed Services Committee that has required attendance attached to it, so I first of all just thank you for holding this important hearing on updating the Endangered Species Act. I look forward to hearing from the witnesses regarding the involvement of voluntary species conservation and recovery program.

As Chairman of the Environment and Public Works Committee, what the ESA has implemented is of keen interest to me as I consistently hear from people in my State of Oklahoma and how they struggle to balance the presence of species on their land with their need to make a living. Sometimes we in Washington forget people need to make a living to pay for all this fun we are having here.

According to the Fish and Wildlife Service, nearly two-thirds of the listed species reside on private lands. It is clear then that the Government must work with landowners not in spite of them if we want to make any meaningful strides at species recovery, the primary goal of the Act.

President Bush recognized this issue in 2004 when he signed Executive Order No. 13352 ensuring that Federal Agencies pursue new cooperative conservation actions designed to involve private landowners rather than make mandates they must fulfill.

The Fish and Wildlife Service has created some programs to encourage landowner participation and provide them with guarantees that their good deed will not be undone. The Partners of Fish and Wildlife programs is an excellent example. I had a hearing in my State of Oklahoma on this and we had testimony from our landowners on how great it was to be working with Fish and Wildlife, with the bureaucracy and accomplishing things and this is something they were not doing for Federal dollars because the match is very small; they were doing it to be cooperative. That program needs to be enhanced and I think we are planning to do that with other legislation.

As we begin considering legislative changes to the Act, I will be seeking ways to address the perverse incentives for landowners who find endangered and threatened species on their land. The Endangered Species Act contains numerous prohibitions but contains pitifully few incentives to actively create and preserve habitat on private lands. As an unintended result, landowners are encouraged to make their land as inhospitable as possible in order to avoid overly burdensome and often economically devastating regulation.

I am looking forward to recommendations from the witnesses as to how to create a comprehensive incentive strategy that addresses the needs of all kinds of private landowners. We must be careful not to craft a one size fits all strategy. For example, some of the current incentive programs work for one time events like timber cutting and land development but not for ongoing operations like ranching and farming. In addition, many incentives programs are too expensive and time consuming for the small landowner. I would want to ensure that we create a full complement of landowner incentives to address site specific needs.

Another critical component to meaningful landowner incentives is the inclusion of assurances for landowners who take action to conserve and recover species on his or her land. They need to know a deal is a deal. When a private landowner enters an agreement to actively manage their land for a species, they should receive guarantees that the Government cannot continually ask them to do more.

Finally, landowner incentive programs need to contain real incentives and not simply be a way to avoid regulation. We need to ensure a true benefit to the landowner.

There will be other priorities for me as we begin looking at the legislation to update the Act. For example, the Fish and Wildlife Service is currently being inundated with lawsuits. I am concerned that resources that could be used in on-the-ground conservation are being diverted to defend lawsuits. When I began my tenure as Chairman of the Environment and Public Works Committee, I stated that I believe we should base regulatory and legislative decisions on sound science, so I will be interested in incorporating the use of independent science in decision-making.

Additionally, I have never believed that it makes sense that the Service should be precluded from considering economic costs when deciding whether or not to list a species as endangered or threatened. The Service can and must consider that when designating critical habitat, this requirement should be extended to other decisions being made. This analysis should also consider the impacts

to landowners who would be directly affected. The example I have often used is in my State of Oklahoma is the Arkansas Shiner. We had testimony about two years ago that the cost to landowners in that particular water area was something like $700 per farm. These things that have to be considered.Finally, I also believe that those affected most by the Service's decisions should be directly involved in making them. This includes States and local entities as they have the closest knowledge of the species, its habitat and local conditions.

I look forward to working with the members of the Committee on legislation to update the Endangered Species Act so that it creates positive incentives to protect and recover species while at the same time safeguarding property rights and giving landowners meaningful and lasting assurances.

Mr. Chairman, you have a tough job. We went through this before, and there will be a lot of people pulling in all directions. We want to get something constructive done that will protect species and will protect homeowners' rights.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Mr. Chairman, thank you for holding this important hearing on updating the Endangered Species Act (ESA). I look forward to hearing from the witnesses regarding their involvement in voluntary species conservation and recovery programs. As Chairman of the Environment and Public Works Committee, the way the ESA has been implemented is of keen interest to me as I consistently hear from people in Oklahoma and how they struggle to balance the presence of species on their land with their need to make a living.

According to the Fish and Wildlife Service, nearly two-thirds of listed species reside on private lands. It is clear, then, that the government must work with landowners, not in spite of them, if we want to make any meaningful strides at species recovery, the primary goal of the Act. President Bush recognized this issue in 2004 when he signed Executive Order 13352 ensuring that Federal agencies pursue new cooperative conservation actions designed to involve private landowners rather than make mandates that they must fulfill. The Fish and Wildlife Service has created some programs to encourage landowner participation and provide them with guarantees that their good deeds will not be undone. The Partners for Fish and Wildlife program is an excellent example of this and why I was pleased to author the program's authorizing legislation, which passed the Senate unanimously last month. At a recent field hearing in Oklahoma on this program, landowners, government and environmental groups all expressed incredible enthusiasm for it. It is clear that, when done properly, voluntary conservation agreements really can work.

As we begin considering legislative changes to the act, I will be seeking ways to address the perverse incentives for landowners who find endangered or threatened species on their land. The Endangered Species Act contains numerous prohibitions but contains pitifully few incentives to actively create and preserve habitat on private lands. As an unintended result, landowners are encouraged to make their land as inhospitable as possible in order to avoid overly burdensome and often economically devastating regulation.

I am looking forward to recommendations from the witnesses as to how to create a comprehensive incentive strategy that addresses the needs of all kinds of private landowners. We must be careful not to craft a one-size-fits all strategy. For example, some of the current incentive programs work for one-time events, like timber cutting or land development, but not for ongoing operations, like ranching and farming. In addition, many incentive programs are too expensive and time-consuming for the small landowner. I will want to ensure that we create a full complement of landowner incentives to address site-specific needs.

Another critical component to meaningful landowner incentives is the inclusion of assurances for landowners who take action to conserve and recover species on his or her land. They need to know that a "deal is a deal." When a private landowner enters into an agreement to actively manage their land for species, they should re-

ceive guarantees that the government cannot continually ask them to do more. Finally, landowner incentive programs need to contain real incentives and not simply be a way to avoid regulation. We need to ensure a true benefit to the landowner.

There will be other priorities for me as we begin looking at legislation to update the Act. For example, the Fish and Wildlife Service is currently being inundated with lawsuits. I am concerned that resources that could be used in on-the-ground conservation are being diverted to defend lawsuits. When I began my tenure as Chair of the Environment and Public Works Committee, I stated that I believe we should base regulatory and legislative decisions on sound science so I will be interested in incorporating the use of independent science in decision-making.

Additionally, I have never believed that it makes sense that the Services should be precluded from considering economic costs when deciding whether or not to list a species as endangered or threatened. The service can and must consider them when designating critical habitat and this requirement should be extended to other decisions made by the Services. This analysis should also consider the impacts to landowners who may be indirectly affected. For example, when the Fish and Wildlife Service first attempted to designate critical habitat for the Arkansas Shiner, the U.S. District Court threw out their economic assessment because they only considered the impact on the agencies involved and did not consider the effects on downstream farmers and ranchers, like the ones in Oklahoma.

Finally, I also believe that those affected most by the Services' decisions should be directly involved in making them. This includes States and local entities, as they have the closest knowledge of the species, its habitat and local conditions.

I look forward to working with the members of the committee on legislation to update the Endangered Species Act so that it creates positive incentives to protect and recover species while at the same time safeguarding property rights and giving landowners meaningful and lasting assurances.

Thank you, Mr. Chairman, for holding this important hearing and I look forward to hearing the testimony.

Senator CHAFEE. That is the goal. Thank you, Mr. Chairman.

OPENING STATEMENT OF HON. LINCOLN CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

I welcome you today to the Subcommittee's second hearing on the Endangered Species Act. In the 105th Congress, Senators Dirk Kempthorn and John Chafee initiated a process to take a hard look at improving the Endangered Species Act which culminated in the introduction and Committee passage of S. 1180, the Endangered Species Recovery Act of 1997. One of the consensus items included in this bipartisan bill was a package of voluntary incentives for private landowners to protect threatened and endangered species and their habitats.

As this Subcommittee gears up to review the Act nearly 8 years later, we are once again hearing a great deal of interest from a variety of interested parties about the importance of incentives for landowners to protect species on private lands. According to the U.S. Fish and Wildlife Service, over 70 percent of the Nation's landscape is in private ownership and nearly two-thirds of federally listed species are found on private lands.

With many threatened and endangered species solely dependent upon private lands for their survival, the goals of the Endangered Species Act cannot be attained unless Federal incentives are available for voluntary participation of the private sector in species protection.

We have invited a range of witnesses to appear before us today to discuss existing Federal programs to protect federally listed species on private lands. In addition, we will also hear from a number of witnesses on new and innovative partnerships underway at the

Federal, State and local levels to encourage private landowners to provide needed habitat for species.

The U.S. Fish and Wildlife Service and the Natural Resources Conservation Service both have hands-on experience working with private landowners. Programs such as the Safe Harbor agreements, habitat conservation plans, Partners for Fish and Wildlife and the Wildlife Habitat Incentives Program are just a few of the tools used by these Federal agencies.

Through these programs positive incentives are created to reward landowners for protecting and conserving threatened and endangered species and their habitats. Further, several of the Fish and Wildlife Service's voluntary programs provide the needed certainty, as Senator Inhofe mentioned, to landowners that their day-to-day permitted activities will not result in enforcement as long as the terms of their agreements are met.

One example of a successful voluntary program is an effort by the Fish and Wildlife Service and Environmental Defense to work with private landowners in North Carolina Sand Hills to protect the Red Cockaded Woodpecker ranging in size from 8 to 9 inches, from beak to tail tip. The Red Cockaded Woodpeckers were designated as endangered in 1970 throughout its entire ranch which extends from Texas east to Florida and north into Virginia. The species require a mature, pine forest with some trees at least 60–80 years old. Once common throughout the southeast, the bird declined precipitously along with its habitat of approximately 60–90 million acres. Representing the Nation's first Safe Harbor Agreement, landowners in North Carolina agreed to manage long leaf pine forests to benefit the Red Cockaded Woodpecker. We will hear more about this effort from witnesses on our second panel.

Other species have been protected in similar fashion including the California Red–Legged Frog known as Mark Twain's legendary jumping frog of Calaveras County which was once found throughout California from the State's coastal streams to the Sierra foothills. The species now has disappeared from 70 percent of its historic range.

The Swallow Tail Butterfly, 1 of the first insects protected under the Endangered Species Act and found only in the hardwood hammocks of the Florida Keys is being focused on by the Fish and Wildlife Service and the University of Florida for development of agreements with private landowners to promote conservation efforts.

The Klamath Basin in California and Oregon is another area where private lands and species protection have clashed in recent years, but renewed focus has been placed on incentives for landowners. In 2001, the concern in the Klamath Basin was over water for farmers versus endangered sucker fish. Today a new problem has arisen with record low numbers of salmon reaching the salmon fisheries along the coastline between Point Sur in Central California and Cape Falcon in Oregon.

Efforts are underway in the Basin to resolve this problem by providing incentives to the area landowners through a Federal Government buy out of interests in water and farmlands from willing sellers. Both the Fish and Wildlife Service and RCS are involved in these efforts.

We will also hear from landowners themselves today and environmental organizations that are on the ground providing technical assistance and educational opportunities to landowners about voluntary incentives for species protection. The Colorado Farm Bureau, American Forest Foundation, Environmental Defense, Plum Creek Timber Company and the National Association of Homebuilders will touch on a wide range of incentives for private landowners being utilized for species conservation.

I also look forward to the recommendations these witnesses might have for additional Federal programs and other Federal incentives that deserve more careful consideration in the months ahead. As this Subcommittee begins to look at reauthorizing the Endangered Species Act, I appreciate the willingness of today's witnesses to come before us and speak on the subject of incentives for private landowners. This is a topic that deserves special attention and an area where I believe we may be able to find a great deal of consensus.

[The prepared statement of Senator Chafee follows:]

STATEMENT OF HON. LINCOLN CHAFEE, SENATOR FROM THE STATE OF RHODE ISLAND

The hearing will come to order. Good morning.

As Chairman of the Subcommittee on Fisheries, Wildlife, and Water, I welcome you today to the Subcommittee's second hearing on the Endangered Species Act.

In the 105th Congress, Senators Dirk Kempthorne and John Chafee initiated a process to take a hard look at improving the Endangered Species Act, which culminated in the introduction and Committee passage of S. 1180, the Endangered Species Recovery Act of 1997. One of the consensus items included in this bipartisan bill was a package of voluntary incentives for private landowners to protect threatened and endangered species and their habitats.

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Through these programs, positive incentives are created to reward landowners for protecting and conserving threatened and endangered species and their habitats. Further, several of the Fish and Wildlife Service's voluntary programs provide the needed certainty to landowners that their day-to-day permitted activities will not result in enforcement as long as the terms of their agreements are met.

One example of a successful voluntary program is an effort by the Fish and Wildlife Service and Environmental Defense to work with private landowners in the North Carolina Sandhills to protect the Red-cockaded Woodpecker. Ranging in size from about 8 to 9 inches from beak to tail tip, the Red-cockaded Woodpecker were designated as endangered in 1970 throughout its entire range which extends from Texas east to Florida and north into Virginia. The species requires a mature pine forest, with some trees at least 60 to 80 years old. Once common throughout the

Southeast, the bird declined precipitously along with its habitat of approximately 60 to 90 million acres.

Representing the nation's first Safe Harbor Agreement, landowners in North Carolina agreed to manage long-leaf pine forest lands to benefit the Red-cockaded Woodpecker. We will hear more about this effort from witnesses on our second panel.

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Efforts are underway in the Basin to resolve this problem by providing incentives to area landowners through Federal government buyouts of interests in water and farmlands from willing sellers. Both the Fish and Wildlife Service and NRCS are involved in these efforts.

We will also hear from the landowners themselves today, and environmental organizations that are on the ground providing technical assistance and educational opportunities to landowners about voluntary incentives for species protection.

The Colorado Farm Bureau, American Forest Foundation, Environmental Defense, Plum Creek Timber Company, and the National Association of Homebuilders will touch on a wide range of incentives for private landowners that are being utilized for species conservation. I also look forward to the recommendations these witnesses might have for additional Federal programs and other financial incentives that deserve more careful consideration in the months ahead.

As this Subcommittee begins to take a look at reauthorizing the Endangered Species Act, I appreciate the willingness of today's witnesses to come before us and speak on the subject of incentives for private landowners. This is a topic that deserves special attention, and an area where I believe we may be able to find a great deal of consensus.

Thank you.

Thank you, and welcome, Ranking Member Senator Clinton. Would you like to go next?

OPENING STATEMENT OF HON. HILLARY RODHAM CLINTON, U.S. SENATOR FROM THE STATE OF NEW YORK

Senator CLINTON. Thank you, Mr. Chairman. Thank you for holding this hearing. It is a pleasure to have your leadership as we hold our second Subcommittee hearing on the Endangered Species Act.

Our first hearing was a general look at the Act and I took that opportunity to explain my basic views about the issue and about the Act which I want to briefly reiterate.

First, I believe the goal of preserving our plant and animal heritage is important for both practical and moral reasons. Second, I think it is clear that the Act has been successful in achieving its primary goal which is to prevent the extinction of species that are in danger of disappearing forever. Third, and this leads to our hearing today, this Act, like anything in human activity, can be improved to better achieve the goal of species recovery.

Like Senator Chafee, I am working hard to understand the potential opportunities for improvement but it is clear to me that 1 of the areas about which there is consensus is that we need to provide additional incentives for private landowners to take an active role in conserving rare plants and animals, both those already listed as threatened and endangered and those on their way towards being listed.

The reasons are clear. First, more than 70 percent of U.S. land is in private hands and nearly two-thirds of our threatened and endangered species are found on private lands. Unless we can help species recover on private lands, we simply are not going to be able to fully meet the goals of the Endangered Species Act.

As Mr. Bean points out in his testimony, species recovery often requires active habitat management which is neither required by the Endangered Species Act nor free of charge. So if we are going to get private landowners more involved, we do need better incentives. There is nearly universal agreement on the need to provide additional financial incentives to conserve threatened and endangered species. I think all of our witnesses in their prepared testimony have touched on this issue and I think there are a range of things we should consider from tax incentives to new grant programs to making better use of USDA and other existing conservation funding programs to better target Endangered Species Act goals. I look forward to exploring what is the best mix of these potential financial incentives.

In addition, I think there is general agreement that there ought to be appropriate regulatory incentives to help landowners promote conservation for both listed and candidate species, but there is some controversy about what that means. I think that is reflected in the testimony that will be presented today.

As a general matter, I think it is important that any regulatory incentives take into account and provide for the uncertainty that is a fact of life when it comes to dealing with life or with endangered species.

Mr. Chairman, I look forward to our witness testimony and the work of the Subcommittee on this important issue.

Senator CHAFEE. Thank you, Senator Clinton.

Senator Vitter.

OPENING STATEMENT OF HON. DAVID VITTER, U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator VITTER. Thank you, Mr. Chairman.

I want to thank you for calling this very important hearing. I also thank the witnesses for being here and participating.

Certainly in Louisiana, as elsewhere, landowners play a vital role in the conservation of endangered and threatened species because, as noted, so much of the habitat, so many of the species are found on private land. I think that providing landowners with clear and compelling incentives to conserve species is a much better way to encourage conservation rather than discourage landowners with penalties and burdensome regulations disrupting an endangered species residing on their land.

Clearly, there is much room for improvement. Only 10 of the 1,264 species listed in North America have been recovered in the

30 years since the Endangered Species Act was enacted. That is a recovery rate of less than 1 percent. Clearly, the time has come to strengthen and improve this Act to do a better job of proactively recovering endangered species.

I want to touch on a few species important to Louisiana and a few ongoing concerns important to Louisiana. Louisiana is home to a threatened species, the Louisiana Black Bear, and the Black Bear Conservation Committee is a really good example of a landowner incentive assistance program. The Louisiana Black Bear relies on the bottom land forest for its habitat and 90 percent of such forests are on private land. Therefore it is clearly necessary to proactively involve and incentivize private landowners in the recovery efforts.

Another concern is the Red Cockaded Woodpecker, something that has been mentioned. There is a Safe Harbor Agreement between the Louisiana Department of Wildlife and the U.S. Fish and Wildlife Service. The agreement gives both agencies flexibility to provide landowners protection when they agree to voluntarily manage their property for the conservation of that woodpecker. That is another good model we can build on.

Another important concern is the Ivory Bill Woodpecker. There has been recent reappearance in Arkansas of the Ivory Bill Woodpecker. Until that recent rediscovery, the River National Wildlife Refuge in Louisiana was the last documented home of that species which was thought to be extinct. I look forward to working on this recovery toward the goal of full recovery.

Finally, I would be remiss if I didn't touch on the Eastern Oyster and this is a very different concern in terms of endangered species. In January 2005, a petition was filed as part of an effort to place the Eastern Oyster, native to the Gulf of Mexico and the Chesapeake Bay, on the Endangered Species List. While the supply of the Eastern Oyster may be dwindling in the Chesapeake Bay, nothing could be further from the truth in the Gulf of Mexico. That oyster is plentiful, abundant and flourishing in the Gulf of Mexico. The problem is that if the Eastern Oyster is put on the Endangered Species List for all geographic locations including the Gulf, it is a huge threat to our vibrant oyster industry. This is an economic impact of $286 million, the State harvests 250 million pounds of the 750 million pounds of oysters harvested nationally. In 2003, Louisiana ranked number one in the Nation according to the National Marine Fisheries Service. It is a very specific concern I have with regard to this issue.

I am not sure there is proper allowance in the law to distinguish between different geographic locations of the same species and I am going to be filing a very narrowly tailored bill in the Senate on this particular oyster issue, a companion bill to a House bill already filed by Bobby Jindal in the House.

I look forward to follow up on all of these issues.

Thank you, Mr. Chairman.

[The prepared statement of Senator Vitter follows:]

STATEMENT OF HON. DAVID VITTER, U.S. SENATOR FROM THE STATE OF LOUISIANA

Mr. Chairman, thank you for holding this hearing today on the Endangered Species Act and landowner incentive-based approaches for protecting listed species. I also want to thank our witnesses for coming to testify about this very important

issue. I am interested in hearing what the witnesses have to say about improving the use of incentives to recover endangered species.

In Louisiana, landowners play a vital role in the conservation of endangered and threatened species because much of the habitat is found on private land. Landowners should not have to pay all the expenses of species recovery. Most landowners who are willing can not always afford to pay the costs associated with managing their land to improve protection of endangered species. Providing landowners with incentives is a better way to encourage conservation rather than discourage landowners with penalties and burdensome regulations for disrupting an endangered species residing on their land.

Only 10 of the 1,264 species listed in North America have been recovered in the 30 years since the Endangered Species Act was enacted. That is a recovery rate of less than 1%. The time has come to strengthen and improve the Endangered Species Act to do a better job of recovering endangered species.

Louisiana is home to the threatened Louisiana black bear and the endangered red-cockaded woodpecker. The Black Bear Conservation Committee is a good example of a Landowner Incentive Assistance Program. The Louisiana Black Bear relies on the bottomland forests for its habitat. Ninety percent of bottomland forests are on private lands. Therefore, it is necessary to involve private landowners in recovery efforts.

Another good example of a landowner incentive program working in Louisiana to conserve the endangered red-cockaded woodpecker is a Safe Harbor agreement between the Louisiana Department of Wildlife and U.S. Fish and Wildlife Service. The agreement gives both agencies flexibility to provide landowners protection when they agree to voluntarily manage their property to conserve red-cockaded woodpecker.

I am excited by the recent reappearance in Arkansas of the Ivory-billed woodpecker. Until the recent rediscovery, the Tensas River National Wildlife Refuge in Louisiana was the last documented home of the ivory-billed woodpecker that was thought to be extinct. I look forward to its full recovery.

The key to achieving success in recovering endangered and threatened species is through incentive-based programs and building partnerships. We should continue to examine ways to improve incentives for species recovery at the local and private landholder levels. Landowners need the encouragement, financing and support of the government to work to restore endangered species.

Another concern I have about the Endangered Species Act is species can be listed based solely on a single petition if it is deemed to be the best scientific data available. In January 2005, a petition was filed as an effort to place the Eastern Oyster, native to the Gulf of Mexico and the Chesapeake Bay, on the endangered species list. While supplies of the Eastern Oyster may be dwindling in the Chesapeake Bay, those in the Gulf of Mexico are plentiful. If listed as endangered, it could halt oyster harvesting and cause great harm to Louisiana's oyster industry, fishermen and Louisiana's economy. The listing of endangered or threatened species needs to be based on real science.

The Louisiana oyster industry has an economic impact of $286 million, according to the Louisiana Department of Wildlife and Fisheries. The State harvests 250 million pounds of the 750 million pounds of oysters harvested nationally each year. In 2003, Louisiana ranked number 1 in the nation, according to the National Marine Fisheries Service.

I look forward to hearing from our witnesses about the use of landowner incentive programs to protect and prevent the extinction of species. Once again, thank you, Mr. Chairman for your efforts to organize this hearing.

Senator CHAFEE. Thank you, Senator Vitter.

I don't believe you are supposed to eat oysters within a month without an "R," is that right? We will have to wait until September.

Senator Jeffords.

OPENING STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE STATE OF VERMONT

Senator JEFFORDS. With the help of the Fish and Wildlife Service, my State of Vermont is currently developing a landowners incentive program to provide technical and financial assistance to

private landowners on 115 at risk species of plants and animals in Vermont.

The incentives program developed by the Fish and Wildlife Service and the Natural Resources Conservation Service provide both financial and legal incentives to private landowners and valuable conservation tools. The success of the Partners for Fish and Wildlife Program promoted this Subcommittee to pass S. 260 authorizing the program.

The Lake Champlain Fish and Wildlife Resources Office, Partners for Fish and Wildlife Program, has completed 30 projects that restore or enhance the streams, wetlands, upland forest habitats in Vermont and the Lake Champlain Watershed of New York.

I look forward to hearing more about safe harbor agreements, habitat conservation plans and the other landowner incentive programs and their successes and your views on the innovative partnership that can provide additional species protections while giving private landowners needed assurances.

Thank you, Mr. Chairman.

[The prepared statement of Senator Jeffords follows:]

STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE STATE OF VERMONT

Thank you, Mr. Chairman, for holding this second in a series of hearings on the Endangered Species Act.

I also want to thank all of the witnesses for taking the time to share their views with the Subcommittee today.

Because almost three-quarters of federally listed threatened and endangered species are found on private lands, providing incentives to private landowners to protect species from extinction is extremely important.

With help from the Fish and Wildlife Service, my State of Vermont is currently developing a landowners incentive program to provide technical and financial assistance to private landowners directed at 115 at-risk species of plants and animals in Vermont.

The incentives programs developed by the Fish and Wildlife Service and the Natural Resources Conservation Service provide both financial and legal incentives to private landowners and are a valuable conservation tool.

The success of the Partners for Fish and Wildlife program, prompted this Committee to pass S. 260, authorizing the program.

The Lake Champlain Fish and Wildlife Resources Office's Partners for Fish and Wildlife Program has completed 30 projects that restored or enhanced streams, wetlands upland forest habitats in Vermont and the Lake Champlain watershed of New York.

I look forward to hearing more about safe harbor agreements, habitat conservation plans, and the other landowner incentive programs, their successes, and your views on other innovative partnerships that can provide additional species protections, while giving private landowners needed assurances.

Thank you, Mr. Chairman.

Senator CHAFEE. Thank you, Senator Jeffords.

Senator Murkowski.

OPENING STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM THE STATE OF ALASKA

Senator MURKOWSKI. Thank you for the hearing this morning and for your effort in pursuing the issue of the Endangered Species Act reauthorization and reform. It is critical that we find ways to make the Act function more effectively by building on its strengths rather than compounding its weaknesses.

With the majority of lands in the United States in private hands, as you mentioned in your opening remarks, and with those lands

holding significant numbers of the species currently listed as threatened or endangered, it is timely to address the issues of incentives. It is difficult to understand the reasons that incentives are so important without also reviewing some of the serious shortcomings of the current laws.

There are 2 aspects of the law that have very serious implications for property owners. First is the definition of taking as an activity that may occur on private land. It is extremely broad and the punishment for a taking is extremely serious. Not every interaction with a species or its habitat is detrimental, yet there are some advocacy groups that appear to take the view that any change from status quo, no matter how slight or accidental, does indeed constitute a punishable offense. This creates a situation in which private owners are under constant threat where even everyday activities may be viewed with alarm by 1 group or another, with dire consequences for the landowner.

Second, there is the judicial issue. Any private party, including the most radical environmental rights advocacy groups, can force a landowner into a position of having to defend himself or herself in court against charges that the landowner's activities lead to a taking, potentially at great cost even if the landowner is eventually exonerated.

I believe we must come to grips with these 2 issues before any incentives for species-conscious land management can truly be successful. As our witnesses will speak to this morning, there have been a number of efforts to craft the equivalent of "hold harmless" provisions conditioned on landowners taking certain pre-approved steps. While these efforts are laudable, we recognize the problems I just mentioned continue to exist, providing evidence that those efforts appear to be less than fully successful. If they were enough by themselves, perhaps we wouldn't have to be here this morning discussing how we might be looking to reform or make better the Endangered Species Act.

In my State of Alaska, we are fortunate to be 1 of those States that has relatively few of the species listed under the Endangered Species Act. We work hard to keep it that way by being good stewards of our resources. However, we also have the lowest percentage of private lands of any State in the Nation, I believe. We have just 10 percent of our State that is private land, so we are in a different situation than many of the other States represented here today.

Despite that, even in Alaska landowners have reason to fear lawsuits alleging an ESA taking. The concern is real. So I look forward to hearing the remarks from the witnesses this morning about the incentives and how they might work to better enhance the Endangered Species Act by building on the strengths of the Act rather than focusing on the weaknesses.

Thank you.

[The prepared statement of Senator Murkowski follows:]

STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM THE STATE OF ALASKA

Mr. Chairman, I want to thank you for continuing to pursue the issue of Endangered Species Act reauthorization and reform. It is critical that we find ways to make the Act function more effectively by building on its strengths rather than compounding its weaknesses.

With the majority of the lands in the United States in private hands, and those lands holding significant numbers of the species currently listed as threatened or endangered, it is timely to address the issue of incentives.

However, I think it is difficult to understand the reasons that incentives are so important without also reviewing some of the current law's serious shortcomings.

There are 2 aspects of the law that have very serious implications for property owners. First, the definition of "taking" as an activity that may occur on private lands under is extremely broad and the punishment for a taking is extremely serious. Not every interaction with a species or its habitat is detrimental, yet there are some advocacy groups that appear to take the view that any change from status quo, no matter how slight or accidental, does indeed constitute a punishable offense. This creates a situation in which private landowners are under constant threat that even everyday activities may be viewed with alarm by 1 group or another, with dire consequences for the landowner.

Second, there is the judicial issue. Any private "citizen" including the most radical animal rights advocacy groups can force a private landowner into a position of having to defend himself in court against charges that the landowner's activities lead to a "taking" potentially at great cost even if the landowner eventually is exonerated.

Mr. Chairman, I believe we must come to grips with these 2 issues before any incentives for species-conscious land management can be truly successful. As our witnesses will attest, there have been a number of efforts to craft the equivalent of "hold-harmless" provisions conditioned on landowners taking certain pre-approved steps.

Those efforts are laudable, but since the problems I cited a moment ago continue to exist, those same efforts appear to be less than fully successful. If they were enough by themselves, we would not be here today.

At just 10% private land, my home State of Alaska has, I believe, the very lowest percentage of private land of any State in the nation. My State of Alaska is home to relatively few of the species listed under the ESA. We consider that a blessing. We also have very little private land—just 10 percent of our State. (We do NOT consider that to be a blessing.)

But even in Alaska, private landowners that tomorrow any tomorrow could bring disaster in the form of a lawsuit alleging an ESA taking. That is just flat wrong.

Innocent parties engaged in their day to day business, with no intent to harm listed species, should be treated as innocent unless there is conclusive scientific evidence to the contrary. Under American standards, no innocent party should have to go in fear, as the saying goes, that "something might be gaining on him."

An Endangered Species Act that sets up the latter situation is doomed to failure. We need an Act that focuses on the positive, not on the negative.

That, Mr. Chairman, is precisely why this hearing is important and why I thank you for calling it.

Senator CHAFEE. Thank you, Senator Murkowski.

Senator DeMint.

OPENING STATEMENT OF HON. JIM DEMINT, U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator DEMINT. Thank you and I appreciate the witnesses being here as well.

I am very supportive of your effort to take a hard look at the Endangered Species Act and try to determine what is working, what is not and try to come up with some creative solutions to make this law work better.

I am glad to hear this morning that I think everyone has mentioned the importance of incentives for landowners as opposed to hitting them with negative regulatory sanctions or making it more difficult for them to develop their property in a way that would be good for the environment.

In my home State of South Carolina where tourism is the no. 1 industry, I was told of a situation where some folks had a terrible time trying to get permits to build a golf course. They had problems getting permits to build a golf course because of an apparently

very popular Red Cockaded Woodpecker. From what I understand about the Red Cockaded Woodpecker, they like to have their young in mature pine trees, they don't fly real well and need a clear under story to thrive and expand. In fact, golf courses with their wide open spaces are the perfect habitat for them.

Once the permits were obtained for this golf course and it was built, the 7 colonies of woodpeckers that were there prior to construction more than doubled to 20 colonies and the golf course has since been recognized by the Audubon Society as a model for environmentally sound development.

This is a perfect example of how development can coexist and even enhance our endangered species. We need to think outside the box and be creative and not be so rigid in how we enforce regulations and not cut off our noses to spite our faces when we are trying to really help endangered species. We should make it easier for people to do the right thing, not more difficult.

I look forward to the testimony this morning and will work together to make this Act work better.

Senator CHAFEE. Thank you, Senator DeMint. It is good to hear a success story.

Today we have on our first panel: Mr. Marshall P. Jones, Jr., Deputy Director, U.S. Fish and Wildlife Service; and Ms. Sara Braasch, Regional Assistant Chief for the West, Natural Resources Conservation Service, USDA.

I would like to remind our witnesses their entire statement will be submitted to the record and we have 5 minutes each for your testimony. We will start with Ms. Braasch.

STATEMENT OF SARA BRAASCH, REGIONAL ASSISTANT CHIEF FOR THE WEST, NATURAL RESOURCES CONSERVATION SERVICE, USDA

Ms. BRAASCH. Thank you.

I appreciate the opportunity to be before you today to discuss the Department of Agriculture's perspective on private land, habitat conservation and restoration. My name is Sara Braasch. I am with the Natural Resources Conservation Service where I serve as the Regional Assistant Chief for the 13 western States including Alaska and the Pacific Basin.

Earlier this week, I celebrated my 1 year anniversary with NRCS. It has been an honor for me to serve with an Agency on the move that is making such an incredible difference on the land. Speaking of service, Mr. Chairman, I would like to mention that we hired a new State Conservationist in your home State of Rhode Island earlier this week. Her name is Roylene Rioes at the Door and I know you will be impressed with her impressive credentials that she brings to you.

The topic of today's hearing gets to the heart of the concept of cooperative conservation. As wildlife conservation serves as an excellent example of how voluntary conservation efforts on private lands can make a difference. I would like to take just a moment to highlight the background of NRCS to place our involvement into context.

For the last 70 years, our Agency has assisted owners of America's private lands who voluntarily want to conserve their natural

resources. We deliver technical assistance that is economically feasible, based on sound science and is suited to a farmer or rancher's site specific needs. In addition, NRCS offers voluntary assistance to landowners in the form of financial assistance, cost share for projects and conservation easements.

In 2002, President Bush signed into law the most conservation oriented farm bill in history providing a $17.1 billion increase in conservation funding. In addition, direction was provided to assist agricultural producers to meet the regulatory burdens they face. Conservation programs can and do help reduce the burden of regulation. Here are just a few examples of actions and assistance the Department of Agriculture has recently offered with respect to habitat enhancement for targeted species.

On May 16, 2006, Secretary Johanns announced the availability of $4 million in financial assistance for the Wetland Reserve Enhancement Program. These partnership proposals will restore and protect habitat for migratory birds and other wetland dependent wildlife. The new enhancement option with in this program allows NRCS to match resources and leverage the efforts of States and local governments to provide even greater assistance for private landowners. Of this funding, a minimum of $500,000 is offered for partnership proposals that address Bog Turtle habitat in the eastern United States. Also included in our wetland reserve enhancement announcement is a minimum of $500,000 to assist with the Ivory Bill Woodpecker habitat. We believe that excellent opportunities exist for developing bottom land, hard wood, wetland habitat projects that will provide long term benefits for the species.

In February, Secretary Johanns announced $2.8 million in the Wildlife Habitat Incentives Program for salmon habitat restoration. Through this initiative, NRCS helps landowners with projects that restore habitat for both Pacific and Atlantic salmon. We are pleased with the gains being made to improve salmon habitat and believe that we can continue to build upon this success in the future.

Habitat conservation for the Greater Sage Grouse in the western United States also serves as a prime illustration of the role farm bill programs and conservation planning assistance can provide. NRCS estimates that in fiscal year (FY) 2004, more than 80,000 acres of Sage Grouse habitat befitted directly from private lands conservation with an additional million acres receiving a secondary benefit. As a result, the U.S. Fish and Wildlife Service made a decision not to list the Greater Sage Grouse as a threatened or endangered species. Partially in response to those gains made on private lands habitat for Sage Grouse and in that decision, the Service emphasized the importance of ongoing and future conservation efforts to the long term health of the species.

With that in mind, I am pleased to report that earlier this morning, Secretary Johanns announced an additional $5 million for Sage Grouse special projects in 11 western States. That will double USDA's commitment to Sage Grouse compared to fiscal year (FY) 2004.

In other assistance, the Health Forest Restoration Act of 2003 authorized the Healthy Forest Reserve Program to make payments to private forest land owners who agree to protect forested acreage

to promote the recovery of threatened and endangered species. This Act contains innovative provisions relating to safe harbor or similar assurances to landowners who enroll land in the program and whose conservation activities result in a net conservation benefit for listed and candidate species. Work is well underway on establishing programmatic rules and procedures for the Healthy Forest Program.

My statement highlights just a few of the many programs available to private landowners and provides a sense of the species and work that private landowners are accomplishing, but there are numerous other species that benefit every day from conservation efforts on farms and ranches across the country. To provide an idea of the magnitude of that, we will provide over $1 billion in funding through the Environmental Quality and Incentives Program this year. Couple that with the Farm and Ranchlands Protection Program and the Conservation Security Program, and it becomes clear that wildlife habitat is receiving major benefits.

Rural America has an excellent story to tell. If we continue to provide the technical assistance and financial resources, we can achieve a win-win for American agriculture as well as wildlife conservation.

Thank you and I would be happy to entertain questions you might have.

Senator CHAFEE. Thank you, Ms. Braasch.

Mr. Jones, welcome.

STATEMENT OF MARSHALL P. JONES, JR., DEPUTY DIRECTOR, U.S. FISH AND WILDLIFE SERVICE

Mr. JONES. Thank you.

I appreciate the opportunity to be here today with my colleague from the Natural Resources Conservation Service to talk to you about incentives for private landowners to be involved in conservation of endangered, threatened candidate species.

As already noted, more than two-thirds of federally listed endangered species depend on private land for their conservation. However, the Endangered Species Act has no legal requirement for private landowners to improve or restore habitat or undertake other programs that will benefit the listed species that occur in those lands. So incentive-based conservation is crucial to our ability to recover those species.

Unfortunately, as also noted, many landowners are fearful of the Endangered Species Act and have been reluctant to engage in activities that would attract imperiled species for fear of increased regulation or restrictions on their use of the land.

We in the Fish and Wildlife Service are committed to the principle that the Federal Government cannot do everything that is needed to recover endangered species and even if we had unlimited resources, we could not and would not do it as well as it would be done if we have a partnership with State governments, with nongovernmental organizations, with the business community and with private landowners. Thus, I am pleased that you have initiated this review of what can be done to support and improve these programs. I am also pleased that you have invited other organizations like the ones on the second panel because the organizations

that are here, Environmental Defense, the Farm Bureau, the Homebuilders Association, Plum Creek and other timber companies and the American Forest Foundation are all organizations that we want and need to work closely with. They help make our programs better, they educate us and working together we believe we can have a stronger conservation program.

The Fish and Wildlife Service has a number of cooperative conservation tools which are detailed in my written statement. Let me briefly highlight a few of these programs and what they have done and can do.

The first Safe Harbor agreement for Endangered Species was signed in 1995 and provided a mechanism for landowners to feel confident that if they improved their habitat and attract more endangered species, they will not later be penalized if they have a need to restore that land to the baseline condition. Working closely with Environmental Defense, the Fish and Wildlife Service recently celebrated the 10th anniversary of that first Safe Harbor agreement. Today, there are more than 325 private and other Federal landowners enrolled in 32 agreements which conserve 36 endangered and threatened species.

Another program is the Candidate Conservation Agreement with assurances. This addresses species that are not listed under the Endangered Species Act but might need to be listed in the future and provides a mechanism for landowners to undertake voluntary, cooperative conservation measures and then receive an assurance that if in spite of those efforts, the species must still be listed as endangered or threatened, so that landowner will not be asked to do anything more or different than what they have already agreed to.

We have 10 such agreements in place covering 24 candidate or declining species and encompassing approximately 300,000 acres. These programs are relatively new but we are committed to improving them because we know that there are always things that can be done better. So we have been working with Environmental Defense, for example, on training and on ways to improve the way we can expedite processing of new Safe Harbor and candidate conservation with assurance agreements.

We also are looking at ways that we can use programmatic or umbrella agreements that may be undertaken with the State which then enable private landowners to quickly qualify under that umbrella agreement.

Another program is the Private Stewardship Grant Program, a relatively new program which provides an opportunity for the Fish and Wildlife Service to work directly with private landowners to conserve imperiled species through on the ground habitat management.

The Cooperative Endangered Species Fund is another program. Through this program we provide grants to States which will support State programs and will also support the development of habitat conservation plans, the implementation of habitat conservation plans and recovery of endangered species through land acquisitions.

The Landowner Incentive Program is another State focused program where we provide funds, as Senator Jeffords has mentioned,

to the State of Vermont for the development of a program to work with private landowners and then for competitive grants to work with those private landowners to restore listed, proposed, candidate or other at risk species on private and tribal lands.

Finally, the Partners for Fish and Wildlife Program, we greatly appreciate the efforts of this Committee and the Senate to pass S. 260 which authorizes the program we have had for many years but now will provide a firm legislative basis for that program which provides for technical assistance and financial assistance for on the ground projects with private landowners. Under that program, I would note that we work very closely with the National Resource Conservation Service and try to complement the programs that the NRCS is undertaking all around the country.

Over the past 16 years, we have agreements with 35,000 landowners covering more than 2 million acres under the Partners for Fish and Wildlife Program.

We appreciate your interest in holding this hearing, bringing us all together, and we look forward to working with you as you consider what else can be done to improve and enhance these programs. I am prepared to answer any question you may have.

Senator CHAFEE. Thank you, Mr. Jones, and I look forward to working with you also as we go forward.

We will have a round of questions of 5 minutes each. I would like to start with Ms. Braasch and 1 of the hot issues, the Klamath Basin issue in the last few years. I would like to know if you can elaborate on what NRCS' role has been in resolving the ongoing conflicts between the fish and farmers in the Klamath Basin and how has NRCS utilized its range of conservation programs to resolve some of the disputes and relieve pressure in this tense situation?

Ms. BRAASCH. The Klamath Basin happens to be part of my region with the region both on the Oregon and California side of the border. As part of that responsibility, I knew early on I had to spend some time on the ground with the people affected. I am pleased to report that the direction you gave us in the farm bill and the $50 million of funding for the Klamath Basin has been well spent and is making a lot of progress.

Some examples in the Klamath include converting irrigation systems so that agricultural producers are able to stay in production on the land but at the same time they reduce their water use so there is more water available for the fish flows. That is done primarily through our Environmental Quality Incentives Program. In addition, we have taken advantage of our Grasslands Reserve Program and our Farm and Ranch Lands Protection Program to look at these farming and ranching operations and how they can stay viable but in the most efficient way possible.

Senator CHAFEE. Have you worked with the Fish and Wildlife for this process?

Ms. BRAASCH. We have. In fact, across the region and at headquarters we have had strong relationships with Fish and Wildlife Service. Specific to the Klamath Basin, there are regular meetings between our folks and the Service. We also have tremendous examples, in the State of Utah with the recent flooding that occurred

this winter on consultation in addition to a strong relationship at headquarters with the Service's Chief and many others.

Senator CHAFEE. Thank you.

Mr. Jones, any comment on your role, the Service's role in the Klamath Basin dispute?

Mr. JONES. We certainly appreciate the efforts that NRCS has made and we think that is an invaluable contribution. I spent time on the ground in the Klamath Basin in 2001 when things were at much more difficult situation than they are today. We think we have made a lot of progress because of efforts to work with landowners in the Basin. For fiscal year (FY) 2006, the President's budget includes a more than $5 million increase for the Partners of the Fish and Wildlife Program specifically directed at the Klamath Basin which builds on a base of about $2 million that have been applying to that program.

We think it is essential that we find ways to work with landowners and the Klamath Basin, I think we haven't solved all the problems but I think we have made a lot of progress and it takes this kind of cooperative effort that Ms. Braasch has mentioned and that we firmly believe in.

Senator CHAFEE. How would these funds be spent as we allocate our resources, acquisition of willing sellers? Where does the money go?

Mr. JONES. No, Mr. Chairman, we do have a separate request for acquisition of a key tract of land on Klamath Lake but the increase in the Partners for Fish and Wildlife Program would be designed to work with landowners, for example to work with the cattle ranchers in the upper Klamath Basin whose land adjoins the river as it flows down into Klamath Lake. We think we can work there to help them reduce impacts from cattle ranching on the stream, increase both the quantity and quality of water which moves down which will benefit the suckers in Klamath Lake and we believe the salmon which are spawning farther downstream.

Senator CHAFEE. Thank you.

Senator Clinton.

Senator CLINTON. I would like to ask each of you for any thoughts you might have on how we could better integrate delivery of State, local and various Federal programs to provide one stop shopping for landowners who are seeking incentives to protect and restore important habitats for wildlife?

Mr. JONES. I think that is a very good question. We are thinking about that right now ourselves. The Fish and Wildlife Service has a multiplicity of small grant programs, relatively small in comparison to some of the very large programs that NRCS has. One thing we think we can do is cooperate more closely with NRCS, participating on the State technical committees, for example, and making sure that every landowner who has access to a county extension agent not only has information about NRCS programs but also about Fish and Wildlife Service programs that may complement those and be available to landowners.

We are also undertaking an internal review right now. I have just received in the last couple of days a draft report on how we can make our programs better, how can we do a better job of expediting the delivery of funds and resources to landowners. One of

the things we are going to look at is how can we make sure all of our materials are clear, user friendly, that our website is something anyone can go to and understand. I will use myself as 1 of the guinea pigs on that because if I can find things on the website probably other people can too. We certainly agree there is a need for us to have programs be both user friendly and accessible to the public or else we are not going to be serving them.

Senator CLINTON. Ms. Braasch.

Ms. BRAASCH. In terms of finding that one stop shop which I know landowners and producers across the country greatly appreciate, I have a couple of ideas. First, finalization of the rules we are working on for the Healthy Forest Reserve Program and the Safe Harbor provisions that are in that program will be beneficial and beyond that, we would like to work with the Service when it comes to programmatic consultation rather than going practice by practice on projects we want to put in place on the ground. We would like to find ways to expedite that delivery so that the landowner only has one stop to make when it comes to implementing a project that is valuable to all wildlife.

Senator CLINTON. As a specific follow up, in Mr. Wiseman's testimony, he notes that individuals own more than half of our Nation's forest land and about half of our rural land is forested. Although I don't know what percentage of endangered or threatened species occur on forested land versus other landscapes, I imagine it is substantial, in all likelihood greater than the small fraction of current conservation funding that is targeted and devoted to tree farmers and other owners of forested land.

Could you each give me your opinion about whether you believe we need to target more conservation funding to tree farmers and their lands to achieve our ESA goals and if so, how can we accomplish that?

Mr. JONES. You are right that a substantial proportion of listed and candidate endangered species and other imperiled species would occur on forest lands and we have I think some very good programs right now as several have mentioned this morning, Safe Harbor programs that involve Red Cockaded Woodpeckers which occur in mature forests. We want to find ways that people can use their land and get a sustainable, economic benefit from that land and at the same time, also provide for the needs of wildlife that can coexist with them.

We have in the northeast a number of candidate species that use forests and it is very important to us that we have ways of working closely with private landowners. I can't give you specific statistics this morning on how much of any 1 of our grant programs has been devoted to forests but we would be pleased to provide you with some information for the record. We certainly can give you the commitment that we want to work closely with family farmers and with the business community, everyone who is involved in forestry to make sure that forests can sustain livelihoods for people but also provide for the needs of wildlife, especially imperiled species.

Senator CLINTON. Ms. Braasch, do you have anything to add?

Ms. BRAASCH. A couple of our programs right now, the Environmental Quality Incentives Program, the Wildlife Habitat Incentives Program, are doing good work with private forest land owners. Our

Chief, Bruce Knight, has clearly set a national priority that we need to do at risk species work. In New York, Rhode Island or Vermont, what happens is we have local working groups that best know the conditions in your State whether timber or anything else and they recommend priorities and ranking criteria under which those applications are reviewed and at the advice of the State Technical Committee including the Fish and Wildlife Service in many cases, decisions are made to fund those projects that will do the most good on the ground and in many cases that has included timber ground.

Senator CLINTON. Thank you.

Senator CHAFEE. Senator Jeffords.

Senator JEFFORDS. Mr. Jones, I have a three part question for you. First, how is the Administration shifted volunteer conservation work?

Mr. JONES. Let me say I think even in the previous Administration, there was a recognition that you cannot recover endangered species without the involvement of private landowners. Those programs have been growing and in the last several years have been very much enhanced. We think those programs are working well. We think we still can make improvements and make them better.

Reaching out to States, the non-governmental community, the business community and private landowners, especially we think is essential because without their cooperation, we just can't achieve the goals of the Endangered Species Act to recover species already listed and prevent other species from ever needing to be listed.

Senator JEFFORDS. Second, which species are benefitting from the various grant programs?

Mr. JONES. I can provide you a detailed answer for the record but we have had several species that certainly have been mentioned this morning that stand out like the Red Cockaded Woodpecker in the southeast; we have a number of species in California benefitting from conservation banks; we have around the country an increasing number of candidate conservation agreement with assurances where landowners get the benefit of knowing that if they undertake activities now and a species gets listed later, they won't be required to do more than they are already doing. It is a deal. It is not just a handshake, they actually get a permit which covers them for that.

It is a broad range of species. In some cases, it is States which are choosing which species to be addressed through the Landowner Incentive Program, which as you mentioned, is active in Vermont, it is the State of Vermont choosing which species, which landowners they should be working with. Similarly under our State Wildlife Grants Program, we now have every State and territory working on a State wildlife conservation strategy. Those are due to be submitted to the Fish and Wildlife Service by the end of this fiscal year. We already have 5 and those 5 we believe are indicative of an excellent effort by States as a whole. So the States will be choosing the species most in conservation need to work on. In the meantime, they have been getting the benefit of that grant program that provides substantial benefits for the States to be working with the broad variety of species.

My point is the Fish and Wildlife Service is not always the best 1 to choose what should be done. We want to provide the program that also enables private landowners, non-governmental organizations, States to choose what they think is most important in the State or the local community and then we work together to help them.

Senator JEFFORDS. I think you may have answered this but how can these programs be improved to better integrate with the Endangered Species Act?

Mr. JONES. We certainly believe that one, we need to practice adaptive management. That is, we undertake things and then we monitor. How well did this work, what are the lessons learned so that we can do it better the next time. Whether that is specific to the biology of a particular species or whether it involves how we can have a more effective program, how we can get the word out to landowners, how we can work with organizations like those on your second panel as well as with NRCS and other Federal agencies and State agencies to make the programs more accessible to them. How can we use more broad programmatic approaches so we only have to do an environmental impact statement 1 time for a whole State that enables landowners all the around the State who qualify to participate under that umbrella program.

We also believe these programs are solid but we believe they could benefit from being codified in law in some way so that everyone could be sure these programs will last, that they will be there and they can count on the Federal Government giving its word and sticking to it.

Senator JEFFORDS. Thank you.

Senator CHAFEE. Thank you first panel. I didn't hear any super harsh criticism from this panel for the ESA. I am sure that will continue on the next panel.

[Laughter.]

Senator CHAFEE. Ms. Braasch, I look forward to meeting Ms. Rioes at the Door in Rhode Island. From what I understand, she went to Montana State University. I did some schooling there myself, so we have something in common.

Thank you for your testimony.

We will now proceed to our second panel. We have Mr. Michael Bean with Environmental Defense; Mr. Paul Campos with the Home Builders Association of Northern California; Mr. Alan Foutz with the Colorado Farm Bureau; Mr. Robert Olszewski with Plum Creek Timber Company; and Mr. Larry Wiseman with the American Forest Foundation. Welcome to all of you here today.

As mentioned for the previous panel, I want to remind the witnesses that their entire statement will be submitted for the record and please keep your presentation to 5 minutes.

We will start with Mr. Bean. Welcome.

STATEMENT OF MICHAEL BEAN, SENIOR ATTORNEY, WILDLIFE DIVISION, ENVIRONMENTAL DEFENSE

Mr. BEAN. Thank you.

Let me begin by saying that it was my pleasure for the last 20 years or more to testify on a number of occasions before this Committee about the Endangered Species Act when your father was a

member and later Chairman of this committee. He was, I think, singularly devoted to this issue and interested in it. If you will allow me, I will describe 1 little thing that made a memorable impression upon me.

In the early 1990s, the Smithsonian hosted a 2 day conference on endangered species conservation and it began with a Friday evening dinner followed by a day of presentations on Saturday. Your father gave the dinner speech on Friday evening, which was a very nice speech, but frankly, it was the last we expected to see of him. We didn't expect him to show up at 9:00 a.m. to sit through the boring part of the conference which was a day of technical presentations but he was there at 9:00 a.m. with his notebook in hand and he stayed throughout the day. I think that was a testament to his very strong interest in this issue. I wanted to share that recollection with you.

May I also say it is a pleasure to be here with Senator Clinton as the Ranking Minority Member. As a fellow graduate of Yale Law School in 1973, it is a real honor to be here with you in this position today.

I have been working on the Endangered Species Act for most of my professional career and for the last decade or more I have been singularly focused on the challenge of conserving rare species on privately owned land. It is increasingly apparent to me that incentives are necessary for that and the reasons are pretty straightforward.

First, many species have most of their habitat on privately owned land and some species have all of their habitat on privately owned land. As others have commented, there is nothing in the existing law that compels landowners to manage their lands positively or beneficially for endangered species and yet for many endangered species some form of active management is clearly necessary.

I give an example in my testimony from Senator Clinton's State of New York of the Bog Turtle which occupies wetlands habitats that have been maintained at least in recent years by the presence of livestock grazing that reduces the shrubbery or woody overstory. As animal agriculture has declined in the northeast, many of those early successional wetlands have secceeded into forested wetlands of no real value for the Bog Turtle. So the only way to maintain those that still exist or to restore those that recently existed is to go out there and remove some of that hard wood and shrubbery understory.

There is no particular reason for landowners to do that if they are no longer engaged in livestock agriculture. So the steps necessary on private land to restore the habitat for that species are steps that can only be taken by or with permission of landowners and somebody has to pay for that. In the State of New York, the Natural Resources Conservation Service has been very helpful in providing funding for many of those projects but without that sort of incentive funding, that sort of habitat restoration is not likely to take place.

Let me say that there are a number of existing incentive programs. By far the most generously funded of those and those with the greatest potential to help endangered species are the various

farm bill conservation programs. However, much of their potential to help endangered species has not been realized and there are a variety of reasons for that.

One thing I would urge this Subcommittee to do, perhaps in conjunction with Mr. Crapo's subcommittee of the Agriculture Committee, is to look at how those existing farm bill programs might be tweaked or adapted to achieve their original farm bill objectives and simultaneously achieve more endangered species conservation benefits. I think there is a wealth of potential progress that could be made there.

Mr. Jones and others have talked about some of the more recent Fish and Wildlife Service initiatives like Safe Harbor agreements, the Landowner Incentive Program, the Private Stewardship Grants Program. These are all good initiatives. They all, however, in my opinion, are handicapped by rather clumsy administration of these new programs. It seems to me there are a number of efficiencies that could be achieved to make each of those programs more easily delivered and more effective on the ground.

Certainly in the work we do with private landowners, when we find a landowner who is willing to do something on his land that is beneficial to an endangered species, that landowner often asks can they get started next week. It is very difficult to explain no, you really can't because there is a process of approval that may take 18 months to complete before we can get started. That just doesn't make sense to most landowners.

I would encourage you in addition to looking at the farm bill programs to take a look at the manner in which the Fish and Wildlife Service is administering some of the good programs it has but programs that are not achieving their potential because of unnecessary internal obstacles to efficient administration.

Thank you and I look forward to answering your questions.

Senator CHAFEE. Thank you, Mr. Bean, especially for your kind words about my dad.

Mr. Campos.

STATEMENT OF PAUL CAMPOS, VICE PRESIDENT, GOVERNMENTAL AFFAIRS AND GENERAL COUNSEL, HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA, NATIONAL ASSOCIATION OF HOMEBUILDERS

Mr. CAMPOS. Thank you.

I am pleased to share with you the views of the 220,000 members of the National Association of Home Builders on landowner incentives under the Endangered Species Act. I thank you for the opportunity to appear before the Subcommittee today.

My name is Paul Campos and I am the Vice President and General Counsel for the Home Builders Association of Northern California. HBANC covers the 9 San Francisco Bay area counties as well as Santa Cruz, Monterey and San Benito Counties.

The San Francisco Bay area has some of the most expensive land and housing in the Nation as well as a steadily expanding number of listed species and extensive critical habitat designations. In California and across the country, the ESA as currently written and implemented is often in conflict with the goals of housing availability and affordability.

Job and population growth are creating a tremendous need for new housing but because of regulatory restrictions on what land can be developed and how, housing availability and affordability are growing problems across the country. In the Bay area for example, only 42 percent of the approximately 110 cities and counties in the region have met their fair share housing obligations for families of all income levels and only 12 percent of the region's households can afford the median priced home which now exceeds $500,000. Clearly we must find improved ways to balance the needs of our growing communities with the need to protect and conserve species and their habitats.

One of the most promising mechanisms for balancing development and species needs is the Habitat Conservation Plan. These voluntary plans often carried out on a regional level seek to reconcile community needs for jobs and housing with the desire to protect large blocks of contiguous wildlife habitat.

In my home State of California, currently approved and pending HCPs will preserve over 1 million acres of habitat for over 100 species and provide necessary funding for active, long term management of those species which as Senator Clinton noted in her opening statement is a very important part of species recovery and conservation but is not mandated by the Act and is not funded.

Importantly, many of the species covered and protected by these HCPs in California are currently not listed under ESA. This is a significant but often under appreciated aspect of many HCPs. Not only do they provide an incentive for landowners to go above and beyond the minimum requirements of the ESA, they bestow significant regulatory protection on a substantial number of unlisted species with the specific aim of preventing the need for listing in the first place.

Unfortunately, HCPs past, present and future are now at risk and it is here that Congress can act to great effect with respect to landowner incentives. The defining benefit to home builders of HCPs is regulatory certainty: The notion, in former Secretary Babbitt's words "that a deal is a deal." But uncertainty now clouds HCPs and their promise that a deal is a deal. The "No Surprise" Rule is under continued legal attack and areas identified in HCPs as appropriate for housing development now face the specter of being designated as critical habitat "no touch" zones.

One of the most important incentives that Congress can provide home builders for continuing to commit to the significant time, resources and energy to develop innovative HCPs is statutory certainty. The East Contra County HCP which my organization and its members have worked on since 2000 provides a vivid illustration. Having been negotiated over the last 5 years and covering 176,000 acres, this HCP is heavily balanced towards species conservation. It will result in the creation, permanent protection and active management of a 30,000 acre preserve while authorizing development of no more than 15,000 acres. Home builders will pay an anticipated fee of more than $20,000 per acre for habitat acquisition and maintenance for the benefit of 28 listed and unlisted species, including the California Red Legged Frog made famous by Mark Twain.

My members' support for this very aggressive and expensive conservation plan is directly tied to the HCPs promise of regulatory certainty. Builders are being told where to build and where not to build. They are being informed of their obligations up front and are being offered the hope of permit streamlining. Yet this certainty is now being undermined. With good reason, home builders fear the legal uncertainty surrounding the "No Surprises" Rule and the relationship of critical habitat designation to HCPs calls into serious question the ability of the Federal Government to deliver on the principle that a deal is a deal. Congress can and should address these clouds of uncertainty by statutorily codifying the "No Surprises" Rule, thereby giving private property owners, State and local governments, tribes and community and environmental organizations the necessary certainty to rely on HCPs.

Congress can further promote voluntary incentives by exempting HCPs from critical habitat designations. The incentive to develop and fund an HCP is significantly diminished if a critical habitat designation is superimposed over the plan area, thereby resulting in duplicative and unnecessary regulation and red tape. The exemption of HCPs from critical habitat is more important than ever in light of the 9th Circuit's recent Gifford–Pinchot decision.

While NHAB applauds the recent efforts by the Federal wildlife agencies to exclude existing and proposed HCPs from specific critical habitat designations, these exclusions are subject to legal challenge. It is imperative that Congress provide a clear statutory exclusion of HCPs from critical habitat if it wants to maintain and further promote this important incentive for landowners.

I thank you for your consideration of NHB's views on this matter and hope that endangered species conservation continues to develop in the direction of incentive based partnerships such as HCPs rather than further litigation gridlock. Congress can go a long way toward ensuring that goal by providing certainty and further incentives to landowners.

Thank you.

Senator CHAFEE. Thank you, Mr. Campos.

Mr. Foutz, welcome.

STATEMENT OF ALAN FOUTZ, PRESIDENT, COLORADO FARM BUREAU

Mr. FOUTZ. Thank you.

My name is Alan Foutz. I am a farmer from Akron, CO on the northeast corner of the State. I serve as President of the Colorado Farm Bureau and serve on the board of directors of the American Farm Bureau Federation and I came here today to testify on behalf of both of those organizations.

Farmers and ranchers have been adversely impacted by the Endangered Species Act for a number of years. We have 33 species listed in Colorado ranging from two distinct populations of the Grey Wolf and the Canadian Lynx to the Boney Tailed Chub. I won't dwell on the problems however but instead will try to focus on a process that has worked for us and one that I think we should consider as part of the solution to the Endangered Species Act.

The Mountain Plover is a small bird found on the western Great Plains. It was proposed for listing by ESA in 1999. As with many

of such species, little was known scientifically about the bird and about its habitat and it was believed the conversion from short grass prairie to agricultural land was destroying the habitat for the bird and the listing would have created a considerable issue for many of us in the farming operations in that particular part of the State.

Scientists didn't know a lot about the bird because it was believed to be living on private range and therefore private landowners were very reluctant to allow State and Federal officers onto their land to look for the bird, but private landowners also did not want to see the Plover listed without scientific justification for listing.

The Colorado Farm Bureau Board of Directors determined that it was important to find out the status of this bird and that meant identifying and studying Plovers on private lands. We had to convince our members to open their lands to researchers so we could study the bird and I have to tell you quite frankly that was an extremely difficult sell to do. It wasn't because our members weren't interested in trying to protect the bird on their lands but it was because of the restrictions they knew would be placed on the lands if that species were found and listed and we would have to provide critical habitat.

To our members' credit they recognized the need for good scientific information, therefore, Colorado Farm Bureau entered an agreement with the Colorado Division of Wildlife, with the U.S. Fish and Wildlife Service, Rocky Mountain Bird Observatory, Nature Conservancy and Colorado State University and we agreed to open our lands so we could inventory this bird and study the ecology of the Mountain Plover.

The result of that was a 3 year study of the movements, locations, and nesting behavior of the Mountain Plovers on agricultural lands. Colorado Farm Bureau members provided access to over 300,000 acres of their private land for this study. Participation was strictly voluntary and Farm Bureau members then donated access to the land as well as time. There was a lot of time put in by individuals as field volunteers went onto their property to search for these birds.

Some of the results that were found were very surprising to the scientists. Researchers found that the agricultural lands rather than destroying habitat were actually providing habitat for these nesting birds during their prime nesting time and many of the agricultural practices we were employing was providing the habitat already for that bird. If we had restricted some of those activities, we may have in fact created a greater problem than we were trying to solve.

One of the aspects of the study found that in our cultivated grounds, there was a higher success of nesting than there was actually under what was considered to be their principal habitat, short grass prairie. Mountain Plovers were still at risk from farm machinery, plowing in the fields where they were. Farmers were more than willing to avoid those nests if they could see them, they are very difficult to see. So part of the remedy was that the Farm Bureau and the Rocky Mountain Bird Observatory developed a unique program which allows our members, whoever wants, to call

a toll free number 72 hours in advance of working in those fields, having the Rocky Mountain Bird Observatory send someone to that location. They will then locate and mark those nests and our members and farmers then simply work around those nesting sites and help protect that bird.

As a result of these and other conservation efforts, the Fish and Wildlife Service determined that listing of the Mountain Plover was not going to be warranted and they withdrew the proposal. The farmers benefitted, the bird benefitted, society benefitted. Colorado farmers and ranchers and the Colorado Farm Bureau learned some valuable lessons from this positive experience. First, we demonstrated that farmers and ranchers will work to protect species and that they were willing to meet government half way in that if allowed to do so.

There was a lot of flexibility in this particular program between the landowners and the various services involved. That made this particular program work. The solution to this program would not have been available to us if the Mountain Plover had been listed. Under the ESA, once that species had been listed, Section 9, the takings prohibition and Section 7, all of the consultation requirements, simply would have imposed restrictions that would have been insurmountable for us to ever have gotten together and solved this problem.

The Endangered Species Act needs to be amended to provide a tremendous amount of flexibility for farmers and ranchers, those on private lands and government to work together so we can come together and come up with voluntary agreements that do protect the species and still allow me to provide for my family in a farming operation and provide food and fiber for the world.

Those incentives may be direct payments, may be tax incentives or simply removing the disincentives that come under the restrictions right now that we see in ESA. We do know that our members want to protect these species, we want to work with government agencies, and so if we can do something to provide a wide range of incentives, be very flexible so that we can work through the programs we have and the different species, I think we can do what we need to do in this area.

I thank you for your time.

Senator CHAFEE. Mr. Olszewski, welcome.

STATEMENT OF ROBERT J. OLSZEWSKI, VICE PRESIDENT, ENVIRONMENTAL AFFAIRS, PLUM CREEK TIMBER COMPANY

Mr. OLSZEWSKI. Good morning.

Plum Creek Timber is the largest private land owner in the United States with nearly 8 million acres of property in 19 States. I have personally worked with State government, industry and trade associations and private industry on forestry and environmental issues over the last 25 years.

Today, I would like to talk to you about Plum Creek's experiences working with the Endangered Species Act to develop a variety of conservation agreements and plans to address both biology and the business of managing forest habitat for endangered species. Habitat for more than a dozen species currently protected under the ESA can be found on Plum Creek's lands including

Northern Spotted Owls, Marbled Murrelets, Grizzly Bears, Gray Wolves, Red Cockaded Woodpeckers and a number of others.

Plum Creek is no stranger to conservation planning under the ESA. Over 2 million acres, nearly a quarter of our corporate ownership nationwide, is under 4 habitat conservation plans and a conservation agreement for grizzly bears in Montana. Plum Creek's Central Cascades HCP, a 50 year plan covering 315 species on 121,000 acres in Washington State was approved in 1996 and is now in its ninth year of implementation.

Our Native Fish HCP in the northwest covers 1.4 million acres of property. We are the largest private timberland owner in a very unique Wisconsin statewide HCP for the protection of the Karner Blue Butterfly. In 2001, we completed a 30-year HCP for the Red Cockaded Woodpecker in Arkansas covering 261,000 acres. Plum Creek manages 75,000 acres of land in Montana's Swan Valley under a very unique grizzly bear conservation agreement under Section 7 with the Service.

These agreements are not easy to complete. The commitment is expensive, time consuming and requires us to open our operations to public scrutiny in an unprecedented fashion. They worked successfully for Plum Creek because of our location and characteristics of our land ownership and unique circumstances to each of the species. We don't have a habitat conservation agreement around each of our species. These foster a logical approach.

These voluntary conservation agreements under the ESA have indeed solved problems. The listing of the Northern Spotted Owl alone in 1990 and subsequent Federal guidelines trapped over 77 percent of Plum Creek's Cascades regional ownership and 108 owl circles. Indeed with every new listing, Plum Creek was getting closer to becoming a poster child for the taking of private lands. For us, the answer was the advent of HCPs and other agreement tools combined with incentives such as the no surprises policy.

Plum Creek and the Federal Government have accomplished concrete contributions to the conservation of endangered species. With the assistance of Federal funds from the Cooperative Endangered Conservation Fund, under Section 6 of the ESA, the State of Montana has purchased the largest conservation easement west of the Mississippi River on 142,000 acres of Plum Creek's property. Fisher and Thompson Rivers are within our Native Fish HCP. These Section 6 funds which are granted for land acquisition within HCPs have also been instrumental in the recent purchase of another 1,100 acres of Plum Creek's property in northwestern Montana.

In the Ouchita River of Arkansas and Louisiana, Plum Creek and the U.S. Fish and Wildlife Service are currently engaging in the development of a Safe Harbor agreement or some variation thereof for Red Cockaded Woodpeckers on property adjacent to our HCP. The planning and habitat work now occurring on this 12,000 acre important area could take the populations of Red Cockaded Woodpeckers from over 20 to 50 territories.

The potential acquisition of this area by the adjacent Upper Ouchita Wildlife Refuge is really the greatest incentive driving this ESA conservation project forward. There is tremendous science that goes into development and tremendous work. A lot of people

are critical that these things don't involve much science but let me assure you that you do. Our Cascades project alone, we authored 13 technical reports, we sought peer reviews from 47 outside scientists, conducted over 50 briefings with outside groups and agencies for additional advice and input. All this material is available for other landowners and agencies developing their own conservation plans.

We do have some recommendations. First and foremost, we do believe as another speaker has recommended, that the no surprise policy be codified. These are major long term commitments of landowners and their properties and they really need the security and assurance of having the knowledge of what kind of agreements they are entering.

The kinds of incentive that I have mentioned with regard to Section 6, other types of incentives that other panelists have mentioned are very critical to enabling these programs to move forward.

There are some roadblocks to entering into these conservation agreements. As an example, I give you the fact that the National Historic Preservation Act gets triggered when you enter into some of these conservation agreements. These can result in some very lengthy and detailed processes of looking for historic sites or endangered species often where there is nothing to be found. It is very bureaucratic and really takes a long time. All these things add up to being a very awkward situation for private landowners with these conservation agreements.

There are some provisions that are triggered under NEPA that also result in some issues and some difficulties probably too detailed to get into but they are included in my testimony.

I want to thank you for the opportunity to testify before you today. The testimony you hear today should provide the Committee with a better understanding of a variety of ESA voluntary agreements and how they have been applied on our properties. I hope it gives you an appreciation of the strategic value that these voluntary agreements can have, both for the conservation of species and the protection of resource economies.

Senator CHAFEE. Thank you.

Welcome, Mr. Wiseman.

STATEMENT OF LARRY WISEMAN, PRESIDENT AND CEO, AMERICAN FOREST FOUNDATION

Mr. WISEMAN. Thank you, Mr. Chairman and Senator Clinton, especially for pointing out 1 inescapable fact and that is that most of the forest land in this country is not owned by companies, it is not owned by the Federal Government but is owned by 10 million individuals and families, most in small tracts of less than 100 acres. Imagine someone who owns 100 acres of land dealing with the kinds of regulatory issues, the kinds of processes, practices and procedures that a 7-million acre owner deals with their staff of lawyers, biologists and accountants—and you get some sense of the dimensions of the problem that our members face when they deal with the Endangered Species Act.

Our 51,000 members are very diverse. Many have owned their land for generations, some have owned their land since before this

Nation was founded and have remained on the land and remained as good stewards. They almost all recognize that the decisions you make in these rooms in Washington are going to have a heck of a lot more impact on their properties than the decisions they make around their kitchen table.

As you can imagine, representing 51,000 members who in turn represent 10 million forest owners is quite a responsibility. I am both honored and humbled to have the opportunity to share what you might hear if you had the privilege, as I have had, of sitting around some of those kitchen tables.

First, 1 of the things that would emerge is most of those folks are not farmers. Most of the forest land that they own is not connected to an agricultural operation. That is important to note because many of the programs that exist for endangered species protection in the farm bill for a variety of reasons—some cultural, some historic, some institutional—are tilted toward farmers.

The second thing you might find is that these folks are volunteers. They choose to be good stewards, they choose to own forest land. There is absolutely no way in the world that you could construct an incentive program that would fully compensate them for all of the tribulations, for all the difficulties that they encounter in managing their land. They want to do it.

Some would perhaps, because of family circumstance or community circumstance, choose to sell their property as development pressures increase, but many others would prefer to stay on the land and continue their heritage of stewardship through multiple generations. An overarching goal for them is policy that makes it easier, not harder for these families to stay on the land and to exercise an almost innate compulsion to conserve property, species and provide environmental services.

In the end, it has to make economic sense. If owning land doesn't make economic sense, the fact is many might find it difficult to say no when those developers come calling, and they come calling very often. The Forest Service estimates we are losing 2,000 acres a day to development. You wouldn't learn about this on television. Every July and August, you get the media reports about fires, the wild fire stories, sort of the ecological equivalent of summer reruns. The crisis we see on these family owned forest lands is in the main an invisible forest health crisis and we urge you to take a close look at that.

Incentive programs are indeed one way to compensate owners for the environmental services they provide but it is important, as Senator Clinton indicated, to consider just how those incentive programs deal with individual owners. Some $4 billion in applications for all conservation programs in 2004 were unfunded, all NRCS programs. Those that were funded, under EQUIP, for example, the largest one, less than 2 percent of expenditures nationwide were directed at forest practices, a big mismatch here, half the rural landscape, 2 percent of expenditures. As you consider incentive programs, consider ways they can be made more accessible to family forest owners.

Three final points: No. 1, consistency. Politically fragile programs can actually de-motivate owners. The brief and sad history of the Forest land Enhancement Program illustrates the point very well.

It was the first substantial incentive program in the Farm Bill aimed solely at family forest owners. It wasn't 18 months after enactment that the President zeroed out funding for FLEP in his budget. Frankly, that doesn't leave people with confidence that Federal programs will provide a stable platform for their investments in stewardship.

No. 2, regulatory certainty. All of the folks here have talked about it. Understand from the family forest perspective that these folks are making decisions for generations to come, for their grandchildren and their grandchildren's grandchildren. They are hesitant to make those decisions if they can't have some certainty that the rules of the game aren't going to change a few years later.

No. 3, program simplicity. One close friend, a man who owns some land in Georgia pointed out to me that he owns land for three reasons: pride, pleasure and profit. He went on to say, if the profit isn't there, he can go on but when the pride and pleasure disappear, when there are too many hoops to jump through, he will disappear too.

I urge you to keep that in mind as you consider changes to the Endangered Species Act.

Senator CHAFEE. Thank you, sir. Thank all of you gentlemen.

We try and solicit criticism as we have these hearings to have testimony come in that is going to give an adverse point of view, if you will. From what I have heard from the 5 of you, the ESA is doing fairly well. Mr. Foutz, you talked about the Mountain Plover and working with the landowners. Am I correct in the assumption that as we look at reauthorizing ESA, maybe looking at the certainty issue many of you have raised, the no surprises, a deal is a deal, but other than that, the ESA is working.

Mr. Bean, I will start with you. Am I correct in that assumption?

Mr. BEAN. I think the Endangered Species Act is doing well for many species. I think it needs to do better for others. In particular, it needs to offer greater incentives than it currently does. I have talked about the various incentive programs and others have as well. They are often not being well targeted and well delivered for the benefits they could potentially provide.

My suggestion would be to give a careful focus on opportunities to improve the targeting and delivery of those existing programs and to investigate new programs. For example, the S. 1180, I believe, in 1997 that the Senate worked on had a provision in it to establish what was known as a habitat reserve program, a voluntary program whereby landowners could enroll land that was useful for endangered species conservation, agree to manage it in ways beneficial to endangered species and receive payment for doing so. These sort of ideas and others like it are worthy of investigation.

Senator CHAFEE. Mr. Wiseman.

Mr. WISEMAN. As Mr. Bean has pointed out, the concept of endangered species protection is embedded in many different pieces of legislation. Understanding the guts of the ESA is one important step in reforming our public policy toward endangered species, but there are a variety of other steps that must be considered, including, as Michael pointed out, funding for incentive programs that support species conservation. I would add, from the perspective of

the voluntary stewards who own most of our forest land, we need a great deal of attention paid to information and education. Accountability is important and I know there is a big drive in the Congress on the agencies and from the White House to demonstrate concrete results. This can have some perverse effects.

For example, the Private Stewardship Grants Program that the Fish and Wildlife Service discussed today is only accepting applications in this current round for on the ground activities—that is, some specific management change that would benefit species. In the past, they have also funded outreach and education programs, programs that can have the multiple impact that one single construction project would have.

We recently, with Environmental Defense, undertook a partnership where we had a demonstration day and a field day and dozens of landowners, including President Jimmy Carter, signed up based on that information to manage for bird habitat, 11,000 acres for the price of management, for the price of a field day, and some educational materials. So as you look forward, you have to consider not just ESA but extension, the NGO work that is being done in outreach and education, the whole panoply of policies.

Senator CHAFEE. Mr. Foutz.

Mr. FOUTZ. You made a comment that referenced me in particular. Don't let me confuse the Committee by assuming the positive outcome we had with this one species is characteristic of all the issues in ESA. We can look at many endangered species issues in Colorado and find all kinds of problems.

The wolf issue is a huge issue in Colorado. We have not come to any conclusion or resolution of that issue. We are working on the Western Sage Grouse issue. We think we may have come to some resolution on how we will deal with that as individuals on private property. That is still out there a little bit but certainly there is a whole number of those issues and those species that are listed out there that are simply not workable under the present guidelines and present constrictions that are placed under endangered species.

So there has to be some significant changes in the Endangered Species Act, I think, if private landowners are going to be a part of saving our Nation's species, that has to be more workable, there has to be some ideas of how it may impact economically those of us on private lands.

I can go back to the Mountain Plover issue, there is only one reason I got involved. This is a real personal issue for me because I was one of the farms that had to go out of business under the listing language that was there for the listing of this bird. I literally would have to have gone out of business and my farm would have been set up for nothing but raising Mountain Plover had that listing language gone through.

That may sound pretty drastic but that is what the language said. The language said, you will do nothing in your fields from March 15 until July 15. If you live in eastern Colorado, every activity on my farming operation takes place between March 15 and July 15. I would have quit. So would have everyone else in eastern Colorado.

We were forced because of the threat of that listing to do something, so we did do something and it worked. I don't want you to misconstrue the fact that this one thing worked here, that all of the Endangered Species Act is working for everyone. It is not.

Senator CHAFEE. Do you have personal experience with the wolf issue?

Mr. FOUTZ. I haven't found it personally on my place. I shouldn't say it that way. I have seen wolves on my place but it is more of an issue on the western slope right now than it is on the eastern side of Colorado. It is an issue for our members who have private property on the western slope who are trying to raise cattle and sheep. It is a big issue.

Senator CHAFEE. Senator Clinton.

Senator CLINTON. I don't have any specific questions. I want to thank all of the witnesses. I think as you pointed out they have been very productive. We understand there are issues and problems. That is why we are holding these hearings so that we can hear from various stakeholders about what they believe would help us to achieve the goals of the ESA in a more creative, flexible way that really brings private landowners to the table and has them involved in the process.

I am going to have to excuse myself to go to an Armed Services Committee hearing but I really want to commend you, Mr. Chairman, for this kind of hearing. It was very productive and useful.

Senator CHAFEE. Thank you, Senator Clinton. I imagine we have a hearing so we can actually listen.

Senator Jeffords.

Senator JEFFORDS. Mr. Bean, could you elaborate on your concern that the existing regulatory policies not interfere with economic incentives for landowners?

Mr. BEAN. The Act has a number of regulatory requirements that I believe are important and really quite essential to deal with certain types of threats to the well being of endangered species. Development activities represent a stark choice typically between sacrificing all habitat value to development or salvaging some habitat value and allowing some development in some localities.

Those same regulatory requirements that try to secure some conservation concessions from development interests when they are developing habitat I think are necessary but when those same regulatory restrictions are applied in the working landscape context of farmers, ranchers, forest land owners, they don't really serve quite the same purpose. Further, some of the incentive programs that the Fish and Wildlife Service and NRCS developed are programs that have to jump through the same procedural hoops as development projects even though the purpose of those programs is to promote conservation on the ground.

That, I think tends to slow and reduce and ultimately frustrate the ability of those incentive programs to deliver as much as possible. Let me give you a concrete example. You mentioned the Landowner Incentive Program in your State. In the State of New Jersey, the State originally proposed with its landowner incentive program to do a number of projects, some of which were for the Bog Turtle which is a listed species, others of which were for unlisted species. Some of the paperwork requirements for doing those

projects for the Bog Turtle, however, were sufficiently onerous for the State that the State decided to abandon the Bog Turtle projects and just do the non-endangered species projects with its Landowner Incentive Program money.

That is unfortunate because it means that a program, the Landowner Incentive Program, that could have had major benefits for endangered species conservation was in that example redirected towards species not endangered because of regulatory requirements that made it more complex for the State to develop projects that affected endangered species. That is the concern I have about the need for the agencies to tailor or adjust the regulatory requirements so those don't get in the way of delivering incentives to landowners for on the ground conservation.

Senator JEFFORDS. Mr. Bean, could you elaborate on your statement that many landowners would rather see the removal of land use restrictions from the Endangered Species Act than any other economic incentives?

Mr. BEAN. I think what I was referring to there was there has been some reference to Safe Harbor agreements. These are agreements by which landowners can voluntarily enhance habitat on their land. These got started a decade ago as a result of work that I and colleagues did in North Carolina for the Red Cockaded Woodpecker. At that time, we were exploring with landowners what it would take to get them to begin managing their forest land in order to produce greater benefits for that endangered bird.

Our expectation was that the landowners would tell us that they wanted economic incentives, that they wanted to be paid, they wanted tax incentives or some other tangible economic incentive but to our surprise, many of the landowners we talked to said to us that they would be willing to manage their land differently, manage it in ways that would benefit that species if only the threat of additional regulation were removed from them through an agreement that made it possible for them to manage without incurring new regulatory liabilities.

In that example, it was more important to those landowners to have the certainty, if you will, that beneficial management would not translate into additional regulatory restrictions than it was to be paid for doing what we would like them to do. That isn't always going to be the case, I am sure, but there are many examples like that where if you can just address landowner anxieties about the regulatory consequences of good stewardship, they will gladly be good stewards without economic incentives, though I would hasten to add if we can provide economic incentives too, we will get even more out of the landowners.

Senator JEFFORDS. Mr. Wiseman, could you elaborate on why you think State or regional HCPs would be more productive than individual HCPs?

Mr. WISEMAN. I know of a couple of cases where our members have attempted to secure individual HCPs. In 1 case, it is still pending and in another case, after 7 years and an expenditure of $28,000 in professional and legal fees, that individual has received the HCP.

The kind of certainty that Michael is talking about can be achieved in other ways. We have found in working with Environ-

mental Defense that schemes that aggregate landowners and give them an opportunity to subscribe to a set of management practices that can be set down, once they are informed, once they are given the assistance and the knowledge they need to implement those practices, they will do it. The key is to do it en bloc with a number of owners. That is the model that we have been helping to develop with Environmental Defense. It is a model I think bears considerable study.

Regulatory certainty for someone who has to sit at his kitchen table and make a decision that is going to have effects for 100 to 200 years is important, it is vital to the confidence they need to commit themselves and their grandchildren's grandchildren to a course of action.

Senator JEFFORDS. Mr. Foutz, could you elaborate on your statement that many landowners would rather see the removal of land use restrictions from the Endangered Species Act than any economic incentives?

Mr. FOUTZ. I kind of go back to what was said a few minutes ago. I think many of our landowners are more concerned with the restrictions and the governmental regulations that are associated with the Endangered Species Act than they are in terms of any kind of economic incentive. What we find in most cases, at least in my part of the country, is that the things we are already doing on our agricultural lands are generally conducive to the species.

If we find that species there, then the only recourse we have to try to survive in a farming operation is not to let anybody know it is there or to do whatever you need to do to take care of the issue so you don't have to deal with the regulatory issues. They are costly. This Mountain Plover issue not only did it cost individuals like me and the other members who provided the 300,000 acres, it cost a lot of money to be involved in that study. It cost Colorado Farm Bureau a considerable sum to provide funds to do that kind of study and that goes with each of the species. If you find them or they are there, the regulatory overhead is just too prohibitive to deal with.

If we can get away from that, I am not sure most of our members would worry about the economic incentives as long as they can do some farming on their place. The economics are always important but if all you want is a bird or prairie dog or a sage grouse and you ask me to provide that, obviously I am going to have some incentive but if you allow me to do the business I know how to do, the economic incentive is not nearly as great and not nearly the issue as the regulatory environment we typically are placed under when a species is found and listed.

Senator JEFFORDS. Thank you.

Senator CHAFEE. Thank you, Senator Jeffords and thank you, gentlemen for good testimony. Some of you came a long way, California, Colorado, Plum Creek. Where is Plum Creek?

Mr. OLSZEWSKI. Actually, I came from Georgia.

Senator CHAFEE. Georgia, still a long distance. Thank you very much.

If there are further questions, we will submit them in writing and hopefully you can respond in writing as we go forward with reauthorization of the Endangered Species Act.

The hearing is adjourned.
[Whereupon, at 4:45 p.m., the subcommittee was adjourned.]
[Additional statements submitted for the record follow:]

STATEMENT OF THE HON. FRANK R. LAUTENBERG SENATOR FROM THE STATE NEW JERSEY

Mr. Chairman, thank you for giving our committee an opportunity to discuss this landmark piece of legislation—the Endangered Species Act. I believe it is our duty to future generations—our children and grandchildren to not only protect the environment, but prevent species of animals from extinction. The Endangered Species Act has done that.

The bald eagle—the symbol of our nation—is 1 of the 17 animals on the endangered species list that are found in my State on New Jersey. We also have a bird in New Jersey called the Red Knot. This bird stops in New Jersey for a few weeks every year, on its way to Canada from South America. It used to be that 100 thousand Red Knots would stop in the Delaware Bay—and bird watchers would spend millions of dollars coming to witness the spectacle. Today, only about 13,000 Red Knots visit our State.

Mr. Chairman, I have 10 grandchildren. I can't imagine how I would feel if I knew that they were growing up in a world where the bald eagle had become extinct—or the Red Knot no longer visited the Delaware Bay. One of the main purposes of the Endangered Species Act is to protect the remaining individuals of these species and their habitats.

Today we are talking about habitat—specifically, the private lands that are crucial to the survival of these species. More than 70 percent of the land in our country is privately owned. So it is no surprise that 80 percent of endangered species rely on private lands for all or part of their habitat.

I believe strongly in the rights of landowners to use their property as they see fit. I also believe that when a specific habitat holds the key to survival for an entire species, we all have a responsibility to future generations. I fully support the concept of providing incentives for private landowners to protect the habitat of endangered species.

This is an area of general agreement, and I hope we can build upon this consensus and will always be able to appreciate the majesty of the bald eagle and other endangered species. Thank you Mr. Chairman.

STATEMENT OF SARA BRAASCH REGIONAL ASSISTANT CHIEF, NATURAL RESOURCES CONSERVATION SERVICE UNITED STATES DEPARTMENT OF AGRICULTURE

Mr. Chairman and Members of the Subcommittee, I am pleased to appear before you today to present the U.S. Department of Agriculture's (USDA) perspective on habitat restoration and preservation on America's private lands. My name is Sara Braasch, and I serve as the Regional Assistant Chief of the Natural Resources Conservation Service (NRCS) for 13 western States, as well as the Pacific Basin. I thank the Members of the Subcommittee for the opportunity to appear, and I express gratitude to the Chairman and members for your interest in USDA's roles in helping farmers, ranchers, and other private landowners improve wildlife habitat. The topic of today's hearing gets to the heart of the concept of Cooperative Conservation, as wildlife conservation serves as an excellent example of how voluntary conservation efforts on private lands can make a difference.

I would like to take a moment to highlight the background of the NRCS to place our involvement into context. NRCS assists owners of America's private land to conserve their soil, water, and related natural resources. Local, State and Federal agencies and policymakers also rely on our expertise. We deliver technical assistance based on sound science, that is suited to a farmer's or rancher's specific needs. In addition, NRCS also offers voluntary assistance to landowners in the form of financial incentives, cost share projects, and conservation easements. In 2002, President Bush signed into law the most conservation oriented Farm Bill in history, which reauthorized and greatly enhanced conservation programs. In total, the new Farm Bill enacted by the President provided a $17.1 billion increase in conservation funding over a ten-year period. In addition, direction was provided to assist agricultural producers meet regulatory challenges that they face.

Conservation programs can and do help reduce the burden of regulation. In the case of the Endangered Species Act (ESA), USDA is working proactively to help producers address the habitat needs of species protected under the ESA, and at-risk

species. Conservation programs such as the Wetlands Reserve Program (WRP), the Wetlands Reserve Enhancement Program (WREP), the Wildlife Habitat Incentives Program (WHIP), the Grassland Reserve Program (GRP), and the Conservation Reserve Program (CRP) addresses the needs of these species.

The Environmental Quality Incentives Program (EQIP) rule includes the requirement for NRCS State offices to include in their Ranking Criteria, "Compliance with Federal, State, local or tribal regulatory requirements concerning soil, water and air quality; wildlife habitat; and ground and surface water conservation." In addition, 1 of the 4 national conservation priorities for EQIP addresses wildlife by seeking the "promotion of at-risk species habitat recovery." This national conservation priority provides additional emphasis in allocation of program funding; direction is also provided to States to include national priorities in ranking individual applications.

NRCS has worked to ensure that our programs are helping landowners address species concerns and providing incentives to not only protect Threatened and Endangered Species habitat, but also to develop and enhance new habitat for the future. Here are just a few examples of actions and assistance that USDA recently has offered with respect to habitat enhancement for targeted species.

THE WETLANDS RESERVE ENHANCEMENT PROGRAM

On May 16, 2005, Secretary Johanns announced the availability of $4 million in financial assistance for the Wetlands Reserve Enhancement Program (WREP) partnership proposals that restore and protect habitat for migratory birds and other wetland dependent wildlife. The Wetlands Reserve Program (WRP) provides restoration assistance and easements of 30 years or permanent in duration to protect wetlands. Through WRP, USDA's goal is to restore and protect more than 2 million acres of wetlands. The new enhancement option within WRP allows NRCS to match resources and leverage the efforts of State and local governments to provide even greater assistance to landowners.

EASTERN BOG TURTLE AND IVORY BILLED WOODPECKER

Of the $4 million recently made available for WREP, a minimum of $500,000 is offered for partnership proposals that address Bog Turtle Habitat in the eastern United States. The Bog Turtle is a threatened species that has a potential range from New York and Massachusetts south to Tennessee and Georgia. Population declines are due mainly to loss of habitat, which consists of wet meadows and other shallow sunny wetlands, and encroachment of vegetation. Bog Turtle-related proposals will compete only with other Bog Turtle proposals under our recent announcement.

Also included in our WREP announcement is a minimum of $500,000 to assist with Ivory-billed woodpecker habitat in Arkansas. We believe that excellent opportunities exist for developing bottomland hardwood wetland habitat projects that will provide long-term benefits. In addition to WREP, NRCS is providing an additional $1 million in WRP funds, and $1 million in Wildlife Habitat Incentives Program (WHIP) cost-share funds, to private landowners for practices that improve and restore native Ivory-billed woodpecker habitat. This includes restoring previously logged areas near deciduous forest swamps to improve and protect critical habitat. We will be announcing successful recipients of funding under this program soon, and feel that the excellent response and applications that have been submitted underscore the opportunities for increased private lands conservation of wildlife habitat. In addition, the Farm Service Agency through the Conservation Reserve Program will provide $2.7 million for Ivory-billed woodpecker habitat.

SALMON

In February, Secretary Johanns announced $2.8 million in the WHIP to help restore and conserve salmon habitat in Alaska, California, Idaho, Maine, Oregon, and Washington. These funds are part of the WHIP Salmon Habitat Restoration Initiative, which NRCS initiated in March of 2004. Through the initiative, NRCS helps landowners with projects that restore habitat for Pacific and Atlantic salmon and include increasing vegetative shade along streams, restoring gravel spawning beds, removing barriers to fish passages and reducing nutrient runoff from farming and ranching operations. In addition to this year's funding, NRCS signed 47 contracts and agreements with landowners, tribes, and municipalities in fiscal year (FY) 2004. These projects totaled more than $3.3 million and improved nearly 900 acres of riparian habitat and opened hundreds of miles of streams for fish passage. We are pleased with the gains being made to improve salmon habitat, and believe that NRCS can continue to build upon this success for the future.

SAGE GROUSE

Habitat conservation for the Greater sage grouse in the western United States serves as a prime illustration of the role of Farm Bill programs and conservation planning assistance. Accelerated assistance provided through NRCS had a positive impact on improving sage grouse habitat. NRCS has provided more than $2.5 million in incentives for sage grouse habitat conservation, primarily through the Grassland Reserve Program (GRP) and WHIP in fiscal year (FY) 2004. NRCS estimates that in fiscal year (FY) 2004 more than 80,000 acres of sage grouse habitat benefited directly from private lands conservation efforts, with more than 1 million acres experiencing a secondary benefit. For fiscal year (FY) 2005, we estimate that roughly 1.5 million acres of sage grouse habitat will benefit from primary and secondary effects combined. As a result, the U.S. Fish and Wildlife Service made a decision not to list the Greater sage grouse as Threatened and Endangered under the ESA. In that decision, they emphasized the importance of ongoing and future conservation efforts to the long-term health of this species.

OTHER ASSISTANCE

The Healthy Forests Restoration Act of 2003 authorized the Healthy Forests Reserve Program (HFRP). The Act authorizes HFRP to make payments for private forest landowners who agree to protect forested acreage to promote the recovery of threatened and endangered species. This program has an authorization of appropriations of $5 million from fiscal year (FY) 2004 through fiscal year (FY) 2008, and can enroll up to 2 million acres. Program contracts can take the form of 10-year cost-share agreements and easements of 30-years or up to 99-years in duration. The Healthy Forests Restoration Act also contains innovative provisions relating to safe harbor or similar assurances to landowners who enroll land in HFRP and whose conservation activities result in a net conservation benefit for listed, candidate, or other species. USDA is working collaboratively with the Department of Interior U.S. Fish and Wildlife Service on establishing these procedures for HFRP.

SUMMARY

In a broad sense, the Administration's commitment toward Cooperative Conservation will mean greater emphasis on assisting producers to identify opportunities for improved and increased fish and wildlife habitat. Mr. Chairman, my statement has highlighted just a few of the programs and provided a general sense of the kinds of species targeted and work that private lands conservation is accomplishing. There are numerous other species that are benefiting everyday from conservation efforts on farms and ranches across America. To provide an idea of the scope and magnitude of our efforts, NRCS will provide over $1 billion in funding through the EQIP program this year. Couple these funds with the additional half billion dollars dedicated through our other conservation programs including the Farm and Ranch Lands Protection Program (FRPP) and Conservation Security Program (CSP) this year, and it becomes clear that wildlife habitat is receiving major benefits. I note that under the CSP, wildlife habitat plays a major part in that program, as any farmer or rancher with wildlife habitat issues on their property must fully address those needs in order to qualify for participation at the highest levels.

We will continue to seek innovative means of protecting and restoring fish and wildlife habitat by offering farmers and ranchers incentive-based programs and planning assistance. We also will continue to seek out opportunities to best target our resources and assistance when special opportunities or circumstances necessitate. Rural America has an excellent story to tell. If we provide solid information, financial resources, and technical assistance, we can achieve a win-win for American agriculture as well as for wildlife conservation.

I would be happy to respond to any questions that Members of the Subcommittee might have.

STATEMENT OF MARSHALL P. JONES JR., DEPUTY DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, U.S. DEPARTMENT OF THE INTERIOR

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to testify today regarding the Endangered Species Act (ESA) and incentives for private landowners.

Passed in 1973, the ESA is intended to conserve plant and animal species that, despite other conservation laws, are in danger of extinction. Two key purposes of the ESA are to provide a program for the conservation of endangered and threatened species to bring them to the point at which measures under the Act are no

longer necessary and to provide a means whereby threatened and endangered species ecosystems may be conserved. The ESA provides significant policy direction and tools to accomplish species conservation and protection. In the past, the way the ESA was implemented placed legal and regulatory burdens on landowners and other members of the regulated community. As a result, many landowners do not want listed species on their property and have been unwilling to engage in activities that would attract species that are or could be listed in the future for fear of increased regulation and negative impacts on their property.

Because more than 70 percent of federally-listed species depend on private lands, our ability to recover species requires the assistance of private landowners and the regulated community. With no legal requirements for private landowners to improve or restore habitat and conditions on their land for the benefit of listed species, incentive-based conservation is crucial to our ability to recover these species. Incentive-based conservation efforts are also important if we are to encourage reluctant landowners to work with the Federal Government in the future.

At the Department of the Interior, the ESA is administered by the U.S. Fish and Wildlife Service (Service). The Service is the lead Federal Agency responsible for conserving and protecting the Nation's fish and wildlife resources. Throughout the United States, the Service strives to fulfill this responsibility through the establishment of innovative programs that implement the Secretary of the Interior's four C's initiative—Conservation through communication, consultation, and cooperation.

COOPERATIVE APPROACHES TO CONSERVATION

The Administration has long recognized that successful protection of many fish and wildlife species depends significantly on the protection and management of habitat, much of which is in private ownership. One of the most promising developments for habitat protection is the advance of cooperative conservation. This fosters innovative approaches to land use and involves local citizens, whose first hand understanding of the challenges facing specific places provides added benefits to conservation efforts. Cooperative conservation also promotes a more broad-based and integrated approach to addressing environmental concerns.

Such an approach is already yielding tangible results. Over the past 5 years, the Federal Government has provided over $1.7 billion in grants to States, tribes, local governments, and private landowners through programs that preserve open space, restore habitat for wildlife, and protect endangered species. These partnerships are achieving substantial conservation benefits. Through partnerships the government has restored millions of acres of habitat; removed invasive exotic species; replanted native grasses; improved riparian habitat along thousands of miles of streams; conserved limited water resources; and developed conservation plans for endangered species and their habitat. In part as a result of these accomplishments, in August 2004, President Bush signed an Executive Order on Cooperative Conservation, asking all agencies to strengthen their efforts to work together and with States, tribes, local governments, and landowners to achieve conservation goals.

The Service firmly supports the philosophy that, by working together, the Federal Government and private landowners can achieve tremendous success in habitat conservation. As such, it is imperative that the Service looks for opportunities to partner with private landowners to protect species and enhance their habitat on private lands. Such cooperative conservation provides opportunities to enhance habitat while maintaining private property rights; it also engages the public in private stewardship. Because restored habitats provide important food, cover, and water, this strategy can contribute to the Service's mission to conserve trust species—such as migratory birds, inter-jurisdictional native fish, and threatened and endangered species—and to control and reduce the spread of invasive species.

We are committed to implementing a cooperative approach through the development of partnerships with others and we are focused on identifying new and better means of encouraging voluntary conservation initiatives. Indeed, many conservation tools are available to facilitate species conservation, including Candidate Conservation Agreements, Candidate Conservation Agreements with Assurances, Safe Harbor Agreements, Habitat Conservation Plans, Conservation Banking, the Partners for Fish and Wildlife Program, and grants through the Landowner Incentive Program, Private Stewardship Grants, and the Cooperative Endangered Species Conservation fund. Each of these tools is described below in more detail with examples of their on-the-ground implementation.

SAFE HARBOR AGREEMENTS AND CANDIDATE CONSERVATION AGREEMENTS WITH ASSURANCES

Safe Harbor Agreements and Candidate Conservation Agreements with Assurances are 2 of many landowner tools coordinated and administered by the Service's Endangered Species Program. Under Safe Harbor Agreements, the focus is on species already listed as threatened or endangered. Under these agreements, non-federal property owners voluntarily commit to implement conservation measures that will result in a net conservation benefit that contributes to the recovery of a listed species, and in return receive assurances from the Service that, at the end of the agreement period, the landowner can return the enrolled property to the baseline conditions that existed at the beginning of the agreement. The first Safe Harbor agreement was signed in 1995 and the Service issued a Safe Harbor Policy and regulations in 1999.

For example, under the programmatic Safe Harbor Agreement between the Service and the South Carolina Department of Natural Resources, 104 non-federal landowners have signed up through certificates of inclusion. The total property enrolled in this agreement to date is almost 400,000 acres with 278 groups of the endangered red-cockaded woodpecker covered under the baseline conditions. Through the management of the enrolled lands, the number of woodpecker groups has been increasing above the baseline, and we expect continued expansion of the species in South Carolina.

Together with Environmental Defense, an organization that was instrumental in launching the Safe Harbor concept, the Service recently celebrated the 10th anniversary of the first Safe Harbor Agreement, at Pinehurst, NC. Today, thanks largely to the continuing support of Environmental Defense and numerous State agencies across the country, more than 325 private and other non-federal landowners have signed up under 32 Safe Harbor Agreements to conserve 36 endangered and threatened species, with more than 3.6 million acres of non-federal land and 16 linear miles of stream enrolled. Work on new Safe Harbor Agreements is underway in many areas, and the Service, Environmental Defense, and the involved States continue to encourage additional landowners to sign up under the existing programmatic agreements.

Similar to Safe Harbor Agreements, Candidate Conservation Agreements with Assurances (CCAAs) are designed to provide incentives to landowners willing to make a voluntary commitment to aid imperiled species. CCAAs are available to any non-federal landowner, such as a private landowner, a local or State Agency, a tribal government or a non-governmental organization. These agreements target species that the Service has identified as candidates for listing or species likely to become candidates. The CCAA policy and associated regulations were issued in 1999. To date, we have 10 CCAAs in place covering 24 candidate or declining species, and encompassing approximately 300,000 acres. Several CCAAs are under preparation with individual landowners, as well as programmatic agreements with States under which multiple landowners can voluntarily participate through certificates of inclusion. For many candidate and declining species, we believe that more widespread use of CCAAs can substantially reduce the need for listing.

For example, in 2002, Soulen Livestock, a family-owned sheep and cattle operation in western Idaho and the Service signed a Candidate Conservation Agreement with Assurances for the southern Idaho ground squirrel, a species identified by the Service as a candidate for listing. In return for allowing nearly 200 squirrels to be relocated to their property from nearby sites where habitat and the squirrels were not protected, and maintaining suitable habitat for them, the agreement specifies that Soulen Livestock will not be required to take additional measures beyond those in the agreement if it is necessary to list the species under the ESA in the future. Earlier this year, due largely to the example set by Soulen Livestock, a "programmatic" Candidate Conservation Agreement with Assurances was signed with the Idaho Department of Fish and Game and the Governor's Office of Species Conservation covering the 4 counties thought to be the historic range of this endemic ground squirrel. We refer to this type of "programmatic" CCAA as an "umbrella" agreement because it can cover multiple landowners. Landowners who have ground squirrels or are willing to allow them to be relocated to their property will be enrolled in this CCAA through certificates of inclusion and thus will receive regulatory assurance that no ESA restrictions will be required beyond those in the agreement if listing is necessary.

Although the CCAA and Safe Harbor programs are still relatively new and growing, we are committed to updating and improving them based on the lessons learned from private landowners and partners participating in them. For instance, the Service is encouraging greater use of programmatic agreements to cover a species across

all or a relatively large segment of its range. Under such agreements, the State wildlife Agency, local governmental entity, or a non-governmental organization signs the agreement and holds the associated permit, and individual landowners can voluntary enroll in a CCAA or Safe Harbor through certificates of inclusion and thus receive the regulatory assurances they seek.

HABITAT CONSERVATION PLANS

In 1982, Congress amended the ESA to allow incidental take permits for landowners who establish "conservation plans." Since that time, the Service has approved more than 400 HCPs nationwide. The Habitat Conservation Planning Program provides a flexible process for permitting the incidental take of threatened and endangered species during the course of implementing otherwise-lawful activities. The program encourages applicants to explore different methods to achieve compliance with the ESA and to choose the approach that best meets their needs.

Perhaps the program's greatest strength is that it encourages locally developed solutions to listed species conservation, while providing certainty to permit holders. Through this process of consultation and cooperation with our partners, the program helps provide for the conservation of listed species on non-Federal land throughout the country.

In April 2005, the Service approved an incidental take permit based on a Habitat Conservation Plan for the lower Colorado River. In all, the plan covers 6 listed species, 2 candidate species, and 18 unlisted species that may become listed in the future. The permit covers the current and future activities of non-federal entities within the States of Arizona, California, and Nevada that involve the consumption of water and power resources. The plan includes the development of 8,132 acres of native riparian, marsh, and aquatic habitats; extensive stocking and monitoring of native fishes; a monitoring and research effort for the species, their habitats, and how best to restore native habitats; and an adaptive management program to take the results of research and monitoring and adjust the conservation actions to best meet the needs of the covered species for the next 50 years.

CONSERVATION BANKS

Conservation banks are lands already owned or acquired by third parties, managed for specific threatened or endangered species, and protected permanently by conservation easements. Banks may sell a fixed number of mitigation credits to developers to offset adverse effects on a species elsewhere. Targeting conservation bank sites and other large mitigation sites to include needed habitat for listed species may reduce the amount of designated critical habitat required for those species. On May 8, 2003, the Service announced new conservation banking guidance to help reduce piecemeal approaches to conservation by establishing larger reserves and enhancing habitat connectivity, while saving time and money for landowners. This guidance details how, when, and where the Service will use this collaborative, incentive-based approach to species conservation.

In December 2003, the Dove Ridge Conservation Bank, a privately-owned, 2,400-acre site located in Butte County, CA, was approved to sell vernal pool preservation credits for the vernal pool fairy shrimp, tadpole shrimp, and Butte County meadowfoam (a plant). It is one of the largest conservation banks for vernal pool species in the State of California. Other resources on the bank site include a stream with wetland banking potential. Establishment of the Dove Ridge Conservation Bank has spurred more interest in preserving habitat within the county, and it is likely that more habitat within this watershed will be acquired for similar conservation purposes.

COOPERATIVE ENDANGERED SPECIES CONSERVATION FUND AND PRIVATE STEWARDSHIP GRANTS

The Cooperative Endangered Species Conservation Fund (CESCF) provides grant funding to States and territories for species and habitat conservation actions on non-federal lands and can include habitat acquisition, conservation planning, habitat restoration, status surveys, captive propagation and reintroduction, research and education. Grants from the Cooperative Endangered Species Conservation Fund allow us to support our State Agency partners in conserving endangered species through wildlife and habitat management, land acquisition, and the development of Habitat Conservation Plans. In addition, these grants have assisted States and territories in building partnerships with private landowners.

In May 2005, nearly 1,800 acres, including wetlands, grasslands, and forests, were dedicated in Northwestern Montana as the Bull River Wildlife Management Area, in part through a Cooperative Endangered Species Conservation Fund Grant to the

Montana Department of Fish, Wildlife, and Parks. Montana's newest public lands are home to bull trout, grizzly bears, and bald eagles. They provide spawning and rearing habitat for bull trout and an important migratory corridor for many wildlife species.

A $1 million Endangered Species Act Recovery Land Acquisition Grant to the State of Hawaii helped the Maui Coastal Land Trust buy 277 acres of the largest undeveloped coastal dunes on the island. The property features 7,000 feet of shoreline paralleled by the Waihe's Reef, a noted traditional fishing and scuba-diving site. The habitat will benefit the endangered Hawaiian stilt, Hawaiian coot, Hawaiian duck, Hawaiian gallinule, Blackburn's sphinx moth, a damselfly, and native plant species such as creeping naupaka, Carter's panic grass, ohai, and awiwi.

PRIVATE STEWARDSHIP GRANTS

The Private Stewardship Grant program works directly with landowners to fund conservation actions for listed species, proposed and candidate species and at risk species on private lands. The program provides grants on a competitive basis to individuals and groups involved in voluntary conservation efforts. To complement the CESCF grant to the State of Hawaii, a $107,000 Private Stewardship Grant was awarded to the Maui Coastal Land Trust to improve habitat. Volunteers are removing invasive plants from coastal spring-fed wetlands and restoring the dunes with native plants such as Hawaiian bulrush, bacopa ('ae'ae), cyperus (makaloa), the "fish-poison plant" (a'kia), and pandanus to provide sites for water birds to forage, breed, and rest. "The goal," says Dale Bonar, Executive Director of the Maui Coastal Land Trust, "is to restore as much native vegetation as we can for endangered species." Hawaiian stilts are already nesting in the wetlands. The Private Stewardship Grants Program provides a unique opportunity for the Service to work directly with private landowners to conserve imperiled species through on-the-ground habitat management on their lands.

PARTNERS FOR FISH AND WILDLIFE

In 1987, the Service established the Partners for Fish and Wildlife Program under the broad authority of the Fish and Wildlife Coordination Act and the Fish and Wildlife Act of 1956. The Partners Program is a voluntary habitat restoration program that recognizes the long-standing and strong natural resources stewardship ethic present in many private landowners. The Partners Program helps landowners restore wetlands, native grasslands, streams and other important habitat on their lands. Through the program, the Service is able to provide landowners with one-on-one customer service and funding assistance for on-the-ground projects that enhance or restore priority fish and wildlife habitat. The Program is conducting hundreds of voluntary habitat restoration projects, specifically focused on restoring habitat for threatened and endangered species and candidate species, including the lesser prairie-chicken, Arkansas River shiner, swift fox, mountain plover, and the Interior least tern.

The program also leverages funds, working to maximize the benefits and minimize the costs for projects. On average, the Service succeeds in leveraging Service resources against non-Service resources by a 2-to-1 match ratio. Over the past 16 years, almost 35,000 agreements with landowners have been completed. The resulting partnerships between the Service and private landowners have resulted in the protection, restoration, and enhancement of nearly 2.5 million acres of private and tribal habitat nationwide.

In Oklahoma, the Partners Program has experienced tremendous success. Since 1990, the Service has initiated 684 projects on over 128,000 acres of private land. This includes 14,400 wetland acres, 82,600 grassland acres, 1,300 woodland and shrubland acres, 25,100 acres of other habitat, and 236 riparian stream miles. Furthermore, Partners Program funds have created over 100 outdoor education classrooms on school campuses that will provide future generations of Americans with hands-on experience working with the land and wildlife.

The Senate recently passed S. 260, the Partners for Fish and Wildlife Act, that would codify the Partners for Fish and Wildlife Program. Because of the tremendous success of the program in working with private landowners to conduct cost-effective habitat projects for the benefit of fish and wildlife resources in the United States, the Administration supports this legislation and appreciates this Committee's support for the program.

LANDOWNER INCENTIVE PROGRAM

Begun in fiscal year (FY) 2002, the Landowner Incentive Program is funded from the Land and Water Conservation Fund. This program provides grants to State and

tribal conservation agencies to help landowners restore habitat for listed, proposed, candidate, or other at-risk species on private and tribal lands. The competitively-awarded grants leverage Federal funds through cost-sharing provisions with State, territorial, and tribal fish and wildlife agencies. The Service requires a 25-percent non-federal share of project costs for this program.

In fiscal year (FY) 2004, the New Jersey Division of Fish and Wildlife was awarded $1.12 million from the Landowner Incentive Program. With these Federal funds and more than $360,000 in private matching funds, the State is implementing approximately 25 projects on private lands throughout its jurisdiction. These projects will result in the conservation and restoration of forests, grasslands, and wetland habitats and protection of endangered bog turtles, declining grassland bird species, rare plant communities and other at-risk species in New Jersey. The State is partnering with private landowners, farmers, and non-governmental organizations including The Nature Conservancy to implement these projects. In addition, New Jersey has developed strong partnerships with other agencies and organizations administering incentive programs, including the Natural Resource Conservation Service, the Service's Partners Program, and Environmental Defense, to ensure that these conservation efforts are coordinated and to share administrative oversight and monitoring of projects.

STATE WILDLIFE GRANTS

The State Wildlife Grant (SWG) program is designed to assist States by providing Federal funds for the development and implementation of programs that benefit wildlife in greatest conservation need and their habitat. Since many issues related to wildlife conservation are not contained by jurisdictional borders, the Service and States are working together to coordinate efforts to conserve endangered and threatened species, manage migratory birds, and lay foundation for good wildlife management.

To establish eligibility for these funds, States and territories had to commit to develop by October 1, 2005, a Comprehensive Wildlife Conservation Strategy or Plan (CWCS). The goal of the State Wildlife Conservation Strategies is to provide a foundation for the future of wildlife conservation and an opportunity for the States, Federal Agencies, and other conservation partners to think strategically about their individual and coordinated roles in conservation efforts across the Nation. As of June 30, the Service had received official submissions from North Carolina, U.S. Virgin Islands, Michigan, Utah, and Arizona. Most other States and territories have put draft strategies out for public review and input. Based on a preliminary review of the strategies submitted, the Service remains confident that high-quality strategies are going to be the "norm."

Congress began appropriating funds for SWGs in fiscal year (FY) 2002. The initial funding provided by the State and Tribal Wildlife Grants Program has already allowed many States and territories to begin implementing conservation actions. For example, in Illinois, the Illinois Department of Natural Resources is partnering with the City of Chicago to purchase 102 acres at Hegewisch marsh. The new acquisition provides optimum nesting habitat for the State-listed little blue heron, yellow-headed blackbird, pied-billed grebe and common moorhen.

CONCLUSION

We appreciate the Subcommittee's interest in incentives for private landowners to conserve and protect species, and we recognize that our ability to make progress is tied to our ability to work with others, including private landowners. As previously stated, with such a high percentage of federally-listed species dependent on private lands, our ability to recover species requires the assistance of private landowners and the regulated community The Service's emphasis on incentive programs like the Land Owner Incentive Program and programs that provide certainty and assurances to private land owners such as Safe Harbor agreements demonstrate how Cooperative Conservation can help more fully achieve the purposes of the ESA. We realize that local involvement will be critical to ensuring the successful, effective, and long-lasting conservation of these species.

I would like to reiterate the Department's interest in working with Congress to improve the Endangered Species Act. We must work together on a bipartisan basis to determine how to get the most value for species conservation out of the Federal resources devoted to the endangered species program. I would be happy to answer any questions that Members may have.

STATEMENT OF MICHAEL J. BEAN ENVIRONMENTAL DEFENSE WASHINGTON, DC

The goals of the Endangered Species Act are among the Nation's most noble and most important. If we attain them, we will leave our children and succeeding generations a rich legacy of diverse and abundant wildlife and the habitats that sustain it. As one who has devoted most of his professional life since graduating from Yale Law School in 1973 to the pursuit of these goals, I firmly believe that they are attainable. Yet, I must acknowledge that they will not be attained—indeed, almost certainly cannot be attained—without offering meaningful incentives to private landowners and others to enlist them more effectively in the task of conservation. In the testimony that follows, I will explain why incentives are essential, examine some of the experience to date with incentive mechanisms, and finally offer some recommendations for this subcommittee to consider.

WHY INCENTIVES FOR CONSERVING ENDANGERED SPECIES ARE ESSENTIAL

Four unavoidable facts underscore the conclusion that incentives to private landowners are essential to achieving the goals of the Endangered Species Act. The first of these is that much of the remaining habitat, and much of the potentially restorable habitat, for endangered species is found on private land. Indeed, many endangered species have most of their habitat on private land, and some have all of it there. Take, for example, North America's smallest turtle, the bog turtle, a threatened species that occurs in at least 3 of the States represented on this subcommittee: Mrs. Clinton's State of New York, Mr. Lautenberg's State of New Jersey, and Mr. Lieberman's State of Connecticut. Almost all the sites where this species occurs are on private land; virtually none are on public land, particularly Federal land. Thus, if we are to conserve this species (and many others like it), we will need to do so on land that is largely in private ownership.

The second unavoidable fact is that many endangered species cannot be conserved simply by putting a fence around their habitats and declaring them off limits to disturbance. Instead, those species—and their habitats—need to be actively managed to sustain them over time. The example of the bog turtle illustrates this point as well. It occurs in early successional, grass- and sedge-dominated wet meadow habitats that are generally sunny and have few trees or other tall vegetation. Historically, these were likely created and sustained by the herds of large native grazing animals that formerly occurred in the Northeast, including elk and bison. More recently, grazing by cows and other domestic livestock has kept many of these sites in the open, sunny condition needed by the bog turtle. Remove the grazing animals, however, and these sites are quickly invaded by red maples and by aggressive exotic species such as purple loosestrife and multiflora rose. These invaders transform sunny grass- and sedge-dominated wet meadow habitats hospitable to bog turtles into heavily shaded wetlands that are inhospitable to bog turtles. Thus, without purposeful management to control invasive plants, the habitats that support bog turtles today will soon cease to do so, as many have done in recent decades—not due to development, but to lack of management.

Let me offer as another example the red-cockaded woodpecker, which also occurs in at least 3 of the States represented on this subcommittee: Mr. DeMint's State of South Carolina, Mr. Vitter's State of Louisiana, and Mr. Warner's State of Virginia. Its habitat is characterized by older pine forests of the Southeast with little or no hardwood understory. Historically, the hardwood understory in these forests was kept to a minimum by frequent lightening-caused fires that would burn quickly through the grassy understory. Those fires would kill most of the hardwoods, but were actually good for the fire-tolerant longleaf pine trees, which not only typically survived the fires, but actually needed fire to aid the germination of their seeds. This natural cycle of frequent low-intensity fires has been dramatically altered as a result of the network of roads and other developments that act as barriers to the movement of fire across the landscape. Now, without prescribed burning or other purposeful management to control the hardwood understory, the relatively open and savanna-like pine forests that support red-cockaded woodpeckers inevitably become dense, mixed pine and hardwood forests inhospitable to red-cockaded woodpeckers. Thus, without prescribed fire or other purposeful management, the forest habitats that support this emblematic species of the Southeast will cease to do so, as many have done in recent decades—not due to development, but to lack of management.

The third unavoidable fact is that although purposeful management is clearly needed to maintain and improve the status of not just the bog turtle and the red-cockaded woodpecker, but of a great many other endangered or threatened species, there is nothing in the Endangered Species Act that compels it. The focus of the Act is on prohibiting harmful activities, backed up by the threat of severe penalties, not on eliciting beneficial activities that could improve upon the status quo. Thus,

the developer in New York or New Jersey who fills a wetland occupied by bog turtles potentially faces a large fine and a jail sentence for doing so. The landowner who stands passively by while the bog turtle wetland on his property is overtaken by invasive trees and shrubs does nothing that the law prohibits. Yet, in both cases, the end result is the same—bog turtles will cease to occupy the site. Thus, to secure the needed active management, not only is the carrot better than the stick, but in reality there is no stick.

The final unavoidable fact is quite simple: the purposeful management needed to sustain and improve species like the bog turtle and the red-cockaded woodpecker is virtually never free. Controlling hardwood understory in Southeastern pine forests through prescribed burning is the least costly method of doing so. However, in many formerly rural areas that are now part of the rural-urban interface, the proximity of development precludes the use of fire. The alternatives of mechanical or chemical control of hardwoods are much more expensive. In the Northeast, as a result of the decline of animal agriculture, people with chain saws, shears, and herbicides often have to do the job that cows or goats formerly did. Further, there is often no reason for landowners to engage in such management practices other than to create or maintain habitat for rare species. Thus, unless one expects that landowners will incur costs to carry out management activities that are neither compelled by law nor necessitated by other land use objectives, there is no reason to believe that the goal of recovering rare species that occur largely on private land and require active management will ever be achieved without incentives to do so.

I said earlier that there were 4 unavoidable facts that underlie the need for incentives. There is a fifth fact that needs discussion as well, though it is no longer an unavoidable one. It is simply this. The landowner who, despite the cost and despite the lack of any legal compulsion to do so, voluntarily restores or improves habitat for endangered species on his land once faced an unfortunate dilemma. The landowner who undertook such voluntary measures was likely to incur additional regulatory restrictions on the use of his land once endangered species began to use the restored or improved habitat. That dilemma can now be avoided through the use of Safe Harbor Agreements, under which landowners undertake voluntary restoration actions without incurring added regulatory liabilities. These agreements were an innovation begun during the tenure of Bruce Babbitt at the Interior Department, and they have embraced by his successor, Gale Norton, as well. In Mr. DeMint's State of South Carolina, over a hundred landowners who together own some 400,000 acres of forest land are participating in Safe Harbor Agreements for the red-cockaded woodpecker. There are also Safe Harbor Agreements for this species in several other States, including Virginia and Louisiana. In New York, The Nature Conservancy has been working to develop a Safe Harbor Agreement for private landowners in the Albany area for an endangered butterfly, the Karner blue butterfly. In the ten years since the first Safe Harbor Agreement was developed, these agreements have shown themselves to be an effective way of overcoming an unintended regulatory disincentive to conservation, one that many landowners have embraced and one that has produced clear benefits for species. As I will note in the recommendations appended to this testimony, however, much more needs to be done to realize the full potential of this promising new conservation tool.

HOW TO IMPROVE THE USE OF INCENTIVES IN THE FEDERAL ENDANGERED SPECIES PROGRAM

What the Endangered Species Act says about incentives is practically nothing. It uses the word only once, and then only in the statement of congressional findings in Section 2. There Congress finds that "a system of incentives" is "key to meeting the Nation's international commitments" and safeguarding its living natural heritage. That is the only mention of incentives anywhere in the Act, and its meaning is decidedly opaque. Unfortunately, after finding that incentives were important, Congress did almost nothing in the Act to create them. Thus, the incentives for conserving endangered species that currently exist are either administratively created (such as Safe Harbor Agreements, the Private Stewardship Grants Program, and the Landowner Incentives Program), or have their basis in other laws that serve broader environmental purposes.

In thinking about how to improve the use of incentives in the Federal endangered species program, there are at least 3 questions that are worth asking. First, can existing, broad purpose landowner incentive programs be administered to produce greater benefits for imperiled species? Second, are new incentive programs needed specifically for endangered species purposes? Finally, what needs to be done to ensure that regulatory policies do not undermine economic incentive policies?

The good news is that there already exist a number of programs that offer economic incentives to landowners for land stewardship purposes broad enough to encompass endangered species conservation. Most of those programs—and the most generously funded of these programs—are administered by the Department of Agriculture, however, rather than the Department of Interior, and the potential of these programs to be administered so as to achieve endangered species benefits has been largely unrealized. There is clear need for the USDA agencies that administer these Farm Bill programs and for the Interior and Commerce Department agencies that administer the endangered species program to work together much more closely. By doing so, it should be possible to accomplish the broad environmental goals of the Farm Bill programs while simultaneously furthering the more specific goals of the endangered species program.

Let me illustrate the need for greater coordination with an example from Committee Chairman Inhofe's State of Oklahoma. The Conservation Reserve Program pays farmers to take cropland out of annual crop production and to plant it with perennial grass or tree cover so as to reduce soil erosion and achieve other environmental benefits. In Oklahoma, thousands of acres of former cropland have been planted in grasses under this program. The soil erosion benefits have been substantial. However, most of the initial plantings were of non-native grasses, which are of little or no habitat value for the lesser prairie chicken, a species that is now a candidate for addition to the endangered species list. Had the same acres been planted in native grasses, the same soil erosion benefits would have been achieved, and the lesser prairie chicken would have benefited as well, possibly to the extent that it would no longer be a candidate for endangered listing.

Missed conservation opportunities like the prairie chicken example are all too common. There are also occasional examples of Farm Bill conservation programs working at cross purposes with the endangered species program. In Pennsylvania, for example, Farm Bill dollars have gone to encourage tree planting in riparian corridors. That is generally a good thing, but some of the areas planted have been potential bog turtle habitat. As discussed earlier, trees should not be planted in bog turtle habitat, but instead need to be removed from it. Better coordination among the agencies is clearly needed, both to ensure that important conservation opportunities are not missed, and to ensure that Agency efforts are not working at cross purposes.

There are also some very encouraging examples of what can happen when efforts are made to align Farm Bill and endangered species program objectives. This is particularly true where Natural Resource Conservation Service State biologists have taken the initiative and focused resources on rare species. In New York, for example, the NRCS has provided critical funding for a number of bog turtle restoration efforts. NRCS State Biologist Mike Townsend deserves recognition for his enthusiastic support of this initiative. In neighboring New Jersey, NRCS's Tim Dunne has provided cost-share assistance for many bog turtle restoration projects through the Wildlife Habitat Incentives Program. Recently, NRCS announced the availability of a half million dollars each of Wetlands Reserve Enhancement Program funds for restoration efforts targeting habitat of the bog turtle and the recently rediscovered ivory billed woodpecker. These examples illustrate the potential for real synergy between Farm Bill conservation programs and the endangered species program—if only the responsible agencies will make a concerted effort to find these opportunities.

This subcommittee can, I think, play a very useful role in bringing that about. Working in concert with the Forestry, Conservation and Rural Revitalization Subcommittee of the Senate Agriculture Committee, whose Chairman, Senator Crapo, has a strong interest in improving the performance of the endangered species program, you can ask the agencies involved to provide you with what they see as the best opportunities to work together to further the conservation of endangered and other imperiled species—what species, in what locations, using what programs? Their answer will go a long way toward answering the first question posed above: can existing, broad purpose landowner incentive programs be administered to produce greater benefits for imperiled species?

Only with a clear answer to that question can one begin to assess the second question, whether new incentive programs are needed specifically for endangered species. Even if one could fully harness the potential of existing broader-purpose incentive programs to serve endangered species objectives, it is likely that new authority will be desirable. This is in part because existing programs have eligibility requirements that limit their applicability but especially because most existing incentive programs are simply cost-sharing programs, in which the program pays for a portion of the cost of implementing a conservation practice, and the landowner pays the remaining portion. The rationale behind such cost-sharing programs is that

there are certain conservation practices that produce both public and private benefits, but the private benefits to the landowner are frequently too small to justify the full expense of implementing the practice. By sharing the cost of implementing these practices, these programs make possible practices, the expense of which would not otherwise be justifiable to the landowner. However, as noted earlier, often the conservation practices needed for endangered species have no independent value to the landowner; they do not increase production, reduce the costs of production, or otherwise further landowner objectives. In such cases, payments that equal the costs of implementing the conservation practice are likely to be needed, not partial cost-share. Real incentive payments that go above and beyond restoration costs are needed as well, at least if the goal is to engage more than the most ardent conservationists among landowners.

There is at least one existing program that offers incentive payments above and beyond cost-sharing assistance, USDA's Environmental Quality Incentives Program (EQIP). Moreover, 1 of the 4 National priorities for EQIP is the conservation of at-risk species. To date, however, EQIP has done little to address this National priority, for at least 3 reasons. First, in most States the criteria for ranking competing projects give a higher priority to run-of-the-mill wildlife conservation projects that are appended to large projects with other purposes, such as construction of waste storage facilities, than to truly ambitious—but freestanding—conservation projects for imperiled species. In a few States, including North Carolina and Utah, a portion of EQIP funds have been allocated specifically for conservation projects for at-risk species. This approach ensures that the merits of wildlife conservation projects are compared directly with those of other wildlife conservation projects, regardless of whether they are appended to a waste storage facility or not.

The second reason that EQIP has thus far done little to address its stated National priority of conserving at-risk species is that little use has been made of the authority to provide incentive payments, above and beyond cost-share assistance. Finally, there has thus far been no real effort to integrate Safe Harbor assurances into EQIP (or, for that matter, other conservation assistance programs). Without that integration of assurances, landowner demand for conservation assistance dollars to carry out projects benefiting endangered species will be modest.

The failure to integrate landowner assurances into EQIP and other conservation assistance programs illustrates how regulatory policies can undermine economic incentive policies. The problem, however, is broader than simply the failure to integrate regulatory assurances into conservation assistance programs. Two years ago, I wrote a highly critical paper in which, after acknowledging some encouraging results from initial implementation of a new set of incentive-based conservation tools, I said the following:

"Despite these impressive initial indications, it is hard to avoid the conclusion that the record of accomplishment with these new conservation tools may be no more inspiring than the record with the old tools unless a number of self-imposed obstacles to success are removed. Those obstacles are self-imposed because they do not inhere in the law itself, but are instead the product of an unimaginative, process-preoccupied, and ultimately self-defeating implementation that discourages and deters opportunities for tangible, on-the-ground improvement. These debilitating constraints have no partisan or ideological provenance; they have stifled effective conservation efforts for endangered species in both Democratic and Republican administrations, and will continue to do so until they are overcome."

That paper attracted the attention of many in the Fish and Wildlife Service, and led to a series of efforts within that Agency to explore these problems and their potential solutions. It has not, however, produced any significant changes. While I would enthusiastically support any new measure this subcommittee might propose to create incentives for conserving endangered species, I would also urge the subcommittee to put its influence behind efforts to prod the Service and NOAA Fisheries to make a series of administrative changes that would remove some of the self-imposed obstacles to success that hinder the incentive-based tools that already exist. Appended to this testimony is a list of some of the problems that can be overcome administratively, and some suggestions for how to overcome them. The subcommittee could perform a very useful service by pressing the agencies either to implement these suggestions or to devise better solutions to the problems identified.

CONCLUSION

In conclusion, incentives work. They help rare species and they appeal to landowners. By utilizing them, we can make more conservation progress more quickly and with less conflict than we can without them. They are not a substitute for regulatory controls, which remain essential in some situations, particularly where strong

development pressures threaten to eliminate all habitat values. In the working landscape of farms, ranches, and forest lands, however, incentives offer a highly useful means of engaging landowners as allies of conservation rather than its adversaries. Congress can and should expand the toolbox of incentive programs to further the recovery of endangered species. No less important, however, it should make every effort to ensure that existing incentive programs are used as effectively as possible to achieve that goal.

APPENDIX

RECOMMENDED ADMINISTRATIVE ACTION TO IMPROVE THE EFFECTIVENESS OF THE FEDERAL ENDANGERED SPECIES PROGRAM

INTEGRATE SAFE HARBOR ASSURANCES INTO THE PARTNERS FOR FISH AND WILDLIFE PROGRAM

The Problem.—On June 17, 1999, FWS announced its Safe Harbor Policy. When it did so, it stated that it was "developing an appropriate process to provide assurances on a programmatic basis to the landowners" who participate in the Partners for Fish and Wildlife Program. A programmatic approach was desirable because it would avoid the complexity and delay of issuing permits for individual landowners. Six years later, the promised action has not yet happened. As a result, the Partners Program has contributed far less to the conservation of endangered species than it could. Without a quick and easy way for participating landowners to gain the assurance that they will not be burdened with new ESA responsibilities at the end of their Partners contract terms, many landowners are reluctant to undertake projects that could benefit these species.

The Solution.—In response to letters from Environmental Defense, then FWS Director Steve Williams stated in a letter dated August 14, 2002, that he would be "recommending intra-Service consultation [pursuant to Section 7 of the ESA] as the primary process for the Act's compliance with the Partners program." Director Williams made clear that he envisioned proceeding in this manner at the State or other sub-national level through several different consultations. He promised that there would be forthcoming "new guidance to help prepare in-house training through Partners program workshops and other avenues to implement that guidance." Director Williams' letter outlined a quite satisfactory solution to the problem. However, nothing has been done to implement it.

FACILITATE FARM BILL CONSERVATION PROGRAM CONTRIBUTIONS TO ENDANGERED SPECIES RECOVERY

The Problem.—Farm Bill Conservation Programs have significant untapped potential to contribute to the recovery of endangered species. These programs are comparatively well funded, their delivery mechanisms are in place, and landowner interest in them is high. They have not, however, often been used to advance the conservation of endangered species, even though all of them could do so, and one—the Environmental Quality Incentives Program—has as one of its four national priorities the conservation of at-risk species. Landowner reluctance to utilize these programs for endangered species conservation purposes is owning to at least two reasons: (1) concerns about potential future land use restrictions if endangered species are attracted to the property; and (2) cost-share requirements discourage participation when the activity undertaken does not have independent value to the landowner.

The Solution.—A much closer working relationship needs to be developed between FWS and the USDA agencies that administer Farm Bill conservation programs. As part of this relationship, FWS needs to provide programmatic assurances that address landowner concerns that their participation will result in new land use restrictions after their contract terms expire. These assurances could be provided in the same manner as discussed above for the Partners Program (*i.e.,* through programmatic Section 7 consultations at the State or other appropriate geographic scale). Greater flexibility with regard to landowner cost-share requirements, or use of incentive payments in programs that allow them (*e.g.,* EQIP) could facilitate projects that do not otherwise contribute to landowner income.

GET THE FRAMEWORK FOR THE HEALTHY FOREST RESERVE PROGRAM IN PLACE

The Problem.—The Healthy Forest Reserve Program was authorized as part of the Healthy Forest Restoration Act. It contemplates the enrollment of privately owned forest land on which landowners agree to implement restoration plans that will benefit federally listed and certain other at-risk species. The legislation specifies

that the Secretary of Agriculture is to make available to participating landowners Safe Harbor or similar assurances under either Section 7 or Section 10 of the ESA. To do this, however, the Secretary of Agriculture needs the cooperation of the FWS, which issues permits under Section 10 and biological opinions under Section 7. This is the only Federal legislation that specifically calls for Safe Harbor assurances for landowners and the only legislation to offer incentives for managing forests to help endangered species. To date, however, FWS and USDA have been unable to agree on how the statutorily promised assurances are to be provided, and the program has yet to get off the ground. Once launched, the program could contribute to the conservation of forest-dwelling endangered species, such as the ivory-billed woodpecker, red-cockaded woodpecker, Delmarva fox squirrel, and others.

The Solution.—Programmatic section 7 consultations, either for particular forest ecosystems (*e.g.,* longleaf pine forests of the Southeast, bottomland hardwood forests of the lower Mississippi River valley, etc.) or particular States offer a relatively easy and straightforward way of providing the statutory assurances specified. It may be advisable to develop these assurances for 1 such forest system or State on a pilot basis.

STREAMLINE SAFE HARBOR REVIEW AND APPROVAL

The Problem.—Since the first Safe Harbor Agreement was completed a decade ago, more than 300 landowners with over 3 million acres of land have enrolled in Safe Harbor Agreements. While significant, these figures represent only a tiny fraction of the potential to use this tool for conserving many different types of rare species. The full potential to use this conservation tool has not been realized because the process of developing, reviewing and approving agreements is unnecessarily slow, cumbersome, and complex.

The Solution.—Safe Harbor Agreements could be made simpler and speedier with a few procedural changes. These include eliminating multiple layers of review by delegating approval of most such agreements to the field office level, eliminating the need to prepare biological opinions in most instances, and clarifying what information needs to be included in an agreement.

REVISE THE CONSULTATION HANDBOOK TO ELIMINATE THE NEED FOR FORMAL CONSULTATION ON PROJECTS HAVING PREDOMINANTLY BENEFICIAL EFFECTS

The Problem.—Under the FWS's consultation handbook, a full scale, formal consultation is required for any Federal action that causes any amount of incidental taking of a listed species. Thus, even projects whose effects are predominantly beneficial (such as projects to restore habitat for, or otherwise improve the well being of, a listed species) must undergo formal Section 7 consultation. The results of such consultations are foreordained, particularly for projects (such as Safe Harbor Agreements) that are required to meet a net conservation benefit or enhancement of survival test. Yet, FWS routinely prepares biological opinions for such projects, diverting Agency resources from other, truly necessary activities.

The Solution.—Relatively minor changes in the language of the consultation handbook would clarify that formal biological opinions are not needed for Federal actions having predominantly beneficial effects, particularly those that are already determined to meet a "net conservation benefit" or similar standard.

STREAMLINE PROCEDURES FOR THE LANDOWNER INCENTIVE PROGRAM

The Problem.—The Landowner Incentive Program competes most closely in function with FWS's Partners for Fish and Wildlife and Private Stewardship Grant Program, and with USDA's Wildlife Habitat Incentive Program. However, it fills two unique roles. First, despite the mantra that State wildlife agencies have the "boots on the ground," many States actually have few field biologists to work with private landowners and limited ability to fund work on private land. LIP is creating that capacity all around the country. Second, unlike WHIP and Partners, LIP is uniquely focused on very rare species and this allows State agencies to focus on small acreage projects that have a big impact for species. However, the program has been slow to achieve on the ground benefits because ESA and National Historic Preservation Act compliance processes have slowed projects by 6 to 18 months and provided perverse incentives for States to work with unlisted species and to duplicate what USDA programs can do, rather than work in more sensitive habitats.

The Solution.—Some States have developed programmatic Section 7 consultation documents that cover broad sets of habitat improvement practices and describe a set of best management practices that ensure States can avoid any take of listed species. This approach allows States to initiate any project covered by a programmatic consultation without the project-by-project review that continues to

plague many States. Proposed changes to the consultation handbook (above) or new solutions using Section 6 cooperative agreements are also needed to cover LIP practices that have a predominantly beneficial effect on the species, but for which some taking of species cannot be avoided.

COMPLETE THE RULEMAKING TO EXPAND THE USE OF ENHANCEMENT OF SURVIVAL PERMITS

The Problem.—On September 10, 2003, FWS published proposed revisions to its regulations pertaining to "enhancement of survival" permits. These revisions were proposed, in large part, to make clear the availability of enhancement of survival permits for privately undertaken habitat enhancement projects that may cause some short term incidental taking of listed species. Without this clarification, proponents of such projects are sometimes made to seek incidental take permits under Section 10(a)(1)(B) of the ESA, which have proven to be more costly, time-consuming, and complex than necessary.

The Solution.—Complete the outstanding rulemaking. Controversy arose over this rulemaking because it was proposed concurrently with the proposal of a policy to allow the importation of endangered species from foreign nations as sport hunting trophies. Many reviewers saw the proposed rulemaking as the vehicle for implementing that highly controversial policy. The result was a flood of adverse comments and the suspension of any forward progress on the rulemaking. The proposed rulemaking serves an important purpose unrelated to the importation policy. Preferably, the 2 ought to be clearly separated, and the rulemaking completed.

EXPAND THE USE OF PRIORITY RANKINGS IN FUNDING ALLOCATION TO ENSURE FUNDING FOR SPECIES LIKELY TO BENEFIT MOST

The Problem.—The resources needed to recover endangered and threatened species far exceed available recovery funding. To maximize the return on available funding, it makes sense to prioritize species and actions for which funding will make the biggest difference in reducing the likelihood of extinction or achieving recovery. The Endangered Species Act directs the USFWS and NOAA to "give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from [recovery] plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity." However, numerous GAO reports and scientific studies provide little evidence that agencies are allocating resources to maximize species benefits.

The Solution.—1982 Recovery Priority Ranking Guidelines should be revised to allow agencies to more easily distinguish which species are priorities by creating more threat and recovery potential ranks. Further, the existing system combines extinction prevention and recovery priorities, automatically giving high recovery potential but low threat species a low ranking. Setting up separate ranking systems and giving each species 2 ranks—1 that identifies extinction prevention priority and 1 to identify its recovery potential would fix this problem. However, the revised ranking systems are meaningless unless they are used to guide resource allocation. The FWS should incorporate its rankings into funding allocation among regions, within regions, and through competitive grant programs. To minimize disruption to existing program functions it may be advisable to implement this through a pilot such as significant expansion of the FWS's "Preventing Extinction, Showing Success" initiative.

CREATE GREATER INCENTIVES FOR STATES TO WORK TOWARD RECOVERY BY USING THE ESA'S AUTHORITY TO REWARD SUCCESSFUL STATES

The Problem.—At present, a State that works hard and successfully to achieve its share of the recovery goals for a species that occurs in several States gets no reward for that effort. Nothing changes until all the other States accomplish their share of recovery goals. As a result, States have less incentive to work toward recovery than they could have.

The Solution.—States need clear incentives to work toward endangered species down-listing to threatened status and to prevent increased endangerment of already threatened species. These incentives should be provided through the creative use of the flexibility in Section 4(d) of the ESA (pertaining to threatened species) to relax Section 9 take prohibitions within a State (or some portion thereof) when recovery objectives for that area have been achieved. By consulting with States over what take prohibitions will continue to apply in which areas, States would also play a greater role in ESA implementation. FWS could signal its intention to this by promulgating a clear policy of using its authority under Section 4(d) in this manner.

REJUVENATE THE SECTION 6 STATE COOPERATIVE AGREEMENT MECHANISM AND GIVE SUBSTANCE TO THE "ADEQUATE AND ACTIVE" STANDARD FOR APPROVAL OF STATE PROGRAMS

The Problem.—When the ESA was enacted, Congress envisioned a close cooperative partnership between the States and the Federal Government through the mechanism of Section 6. In practice, Section 6 has not worked as intended. Review of State programs to determine if they qualify for Federal financial assistance (which has generally been both inadequate and unpredictable) has been perfunctory. Cooperative agreements under Section 6 are boilerplate agreements that contain nothing pertaining to strategies or actions to be carried out. As a result, there has been no use of the authority of Section 6 to develop a conservation strategy that integrates State resources and competencies with Federal resources and competencies.

The Solution.—Rethink the whole approach to Section 6, starting with the development of rules and policies that ask interested States to articulate clear conservation strategies and actions to carry them out. The Federal review of State programs that carry out those strategies should be searching, not perfunctory. The consequence of approval of State programs should be a shared commitment by the 2 levels of government to work cooperatively toward agreed upon goals.

STATEMENT PAUL CAMPOS GENERAL COUNSEL AND VICE PRESIDENT OF GOVERNMENT AFFAIRS FOR THE HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

Chairman Chafee, Ranking Member Clinton, and members of the subcommittee, the National Association of Home Builders (NAHB) appreciates the opportunity to share our views with the Senate Environment and Public Works Committee, Subcommittee on Fisheries, Wildlife, and Water, on Incentives for Private Landowners under the Endangered Species Act (ESA).

NAHB represents over 220,000 member firms involved in home building, remodeling, multifamily construction, property management, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Nationwide, our members are committed to environmental protection and species conservation, however, oftentimes well-intentioned policies and actions by regulatory agencies result in plans and programs that fail to strike a proper balance between conservation goals and needed economic growth. In these instances, our members are faced with significantly increased costs attributed to project mitigation, delay, modification, or even termination.

Importantly, NAHB's members are citizens of the communities in which they build. They seek to support the economy while providing shelter and jobs, partner to preserve important historical, cultural and natural resources, and protect the environment, all while creating and developing our nation's communities. As such, home builders support the U.S. Fish and Wildlife Service's and NOAA Fisheries' (collectively, the Services) efforts to protect and conserve species that are truly in need of protection. A vital component of any conservation effort, however, is to ensure the proper balance of each species' needs with the needs of the States and communities in which it is located. One element necessary to consider in evaluating this balance is whether or not the ESA is meeting its goal of species restoration and recovery. What's more, has it worked well? Has it been an efficient and effective means by which to address the myriad of threats that endangered and threatened species face?

As of July 6, 2005, there were 1,264 U.S. species listed as endangered or threatened under the ESA. Since the Act's inception in 1973, a total of 40 species or subpopulations have been removed from the list. Of those 40, only 10 are U.S. species that have been sufficiently nursed back to health to qualify as "recovered." 9 have gone extinct. The rest of the species are a mixture of U.S. and international creatures that for one reason or another, be it the availability of new information or an amendment to the Act itself, no longer qualify for listing under the ESA. Unfortunately, species are added to the list much, much easier than they are removed.

NAHB believes that unfortunately, even after all these years, the mechanisms employed by the ESA to protect endangered and threatened species are oftentimes awkward and rudimentary. For private landowners and developers, they involve a certain set of prohibited acts and regulated actions that are disproportionately burdensome and onerous. Further, individual landowners often lack the funding and relevant expertise to best protect the species under their particular care. For the majority of the ESA's history, however, there was little if anything under the Act to actively encourage landowner cooperation, those proactive steps needed to aid the recovery of listed species or pre-empt a species from being listed in the first place.

These glaring shortfalls threaten to hamstring the ESA in the coming years. NAHB believes that only by addressing these concerns now, proactively, will species conservation efforts be successful.

In evaluating strategies to update and strengthen the ESA, NAHB believes that 2 key components or strategies within the Act warrant particular attention, the awkwardness of outdated regulatory provisions and the success of conservation incentives. While the ESA harbors several unnecessarily burdensome and duplicative regulatory provisions badly in need of modernization, such as the designation of critical habitat, it has also given rise to resounding conservation success through the use of incentives like Habitat Conservation Plans (HCP). Only by taking stock of the ESA's successes and failures, those provisions that should be updated or revised and those that should be retained as well as expanded, can implementation of the Act be made more effective.

I. REGULATORY PROVISIONS UNDER THE ESA MUST BE UPDATED

In the regulatory arena, the ESA continues to remain much more of a proverbial stick than a carrot. Despite its disproportionate reliance on a relative few private landowners to maintain the extraordinary public good that is biodiversity conservation in this country, there remain very few incentives to encourage active landowner cooperation. Especially in areas where land costs and land values are high and where species conservation and economic growth and development are intertwined, there is a virtual dearth of programs that allow landowners and businesses to even begin to recoup or recapture the costs of voluntary conservation actions. Complicating issues further is the unfortunate reality that the ESA is burdened by a number of disincentives that actively discourage landowner cooperation. Such is plainly not a recipe for continued success. Although many aspects of the ESA warrant reexamination, the provisions below are of particular concern to the nation's home builders.

A. The designation and regulation of critical habitat

Of all programs implemented under the ESA, critical habitat has emerged as 1 of the most controversial and litigation-prone. While NAHB believes that habitat conservation is an important component of species conservation, the question remains as to whether the regulatory provisions outlined in the critical habitat designation process can effectively manage the lands and waters on and in which listed species reside. The Services have stated that the critical habitat designation process is broken, and that the designation of critical habitat consumes precious Agency resources while providing limited benefits to listed species.[1] NAHB agrees.

Furthermore, litigation has skewed the Service's long-held interpretation for evaluating the impact of activities occurring within designated critical habitat. Lawsuits in the 5th and 9th Circuits[2] have challenged the regulatory definition of adverse modification, the standard by which the Services review activities taking place in critical habitat. In the absence of a clear definition of this term, the true role of critical habitat, and indeed the true impact of critical habitat on private landowners, is unclear. Congress should consider whether legislation is required to fully remove any and all confusion.

Several other elements of critical habitat likewise warrant attention and review. One particularly troublesome aspect is the potential duplicative overlay of critical habitat over Habitat Conservation Plans (HCPs) and other voluntary management agreements. If an approved HCP falls within critical habitat, it may be subject to additional regulatory requirements and red tape (or "overlay") of critical habitat that have little or no benefit to listed species. Any incentive to enter into an HCP is lost if the area at issue is also subject to regulation under the critical habitat provisions of the ESA. While NAHB applauds the recent efforts by the Servicesto exclude existing HCPs from specific critical habitat designations, critical habitat "overlay" must be consistently and continually eliminated from land areas already subject to government—approved or pending plans in order to further encourage stew-

[1] "In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources. The Service's present system for designating critical habitat is driven by litigation rather than biology, limits our ability to fully evaluate the science involved, consumes enormous Agency resources, and imposes huge social and economic costs. The Service believes that additional Agency discretion would allow our focus to return to those actions that provide the greatest benefits to the species most in need of protection." (Final Designation of Critical Habitat for 4 Vernal Pool Crustaceans and 11 Vernal Pool Plants in California and Southern Oregon. 68 Fed. Reg. 46684 (August 6, 2003)).

[2] See *Sierra Club v. U.S. Fish and Wildlife Service,* 245 F.3d 434 (5th Cir. 2001), *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004).

ardship through the HCP process. Provisions to achieve this goal have been included in H.R. 1299, the Critical Habitat Enhancement Act, sponsored by Congressman Dennis Cardoza (D-CA). NAHB fully supports this important legislation.

NAHB also believes that the common sense designation of critical habitat depends on the availability of full and complete economic analyses, as well as the full involvement of local landowners and stakeholders. In the past, the Services have incorrectly assumed that critical habitat added no additional costs over species listing, and dismissed the statutory requirement under Section 4(b)(2) of the ESA to conduct an economic analysis of designating lands as critical habitat.[3] The failure of the Services to document the impact of their regulatory actions, as required by the ESA, represents a crucial shortfall in the implementation of the Act. While the last few years have seen an improvement in the process by which the Services conduct these required economic analyses, H.R. 1299 includes specific language which would ensure that economic analyses are sound and complete by requiring that the direct, indirect, and cumulative economic effects of critical habitat designations are considered.

B. Use of sound science

Private landowners, who have been burdened with carrying out many of the responsibilities of the ESA, have repeatedly questioned the science behind the decisions made by the Federal agencies implementing the Act. The aggregate results of erroneous ESA decisions are broad, negatively affect the housing market and the national economy, and at times damage the very species we are trying to protect.

Listing a species and designating critical habitat under the ESA requires the use of the "best scientific and commercial data available." However, there is no definition for this phrase in the ESA, or in the regulations implementing the Act. Consequently, species can be listed based solely on a single petition if it is deemed to be the best scientific data available. Critical habitat can likewise be designated without truly knowing which areas are essential to conservation and with incomplete datasets somehow qualifying for best available data. Additionally, once a species is listed, the Services often ignore additional or new science that supports the de-listing of species. For example, the Bald Eagle, at home across the entire lower 48, is widely viewed as being recovered. Still, it remains on the ESA, some 6 years after initially being proposed for delisting.[4]

The listing of species under the ESA and the subsequent designation of critical habitat for those species must be based on reliable, accurate and solid biological and scientific data. For these reasons and more, NAHB support the passage of legislation that would ensure that sound science is used in ESA decisions.

II. INCENTIVE-BASED PROGRAMS UNDER THE ESA MUST BE PRESERVED

The most important incentive that Congress can give home builders is regulatory certainty. At some point in the regulatory process, builders need to know that there will be no more "bites at the apple" from either the Services or, just as importantly, private litigants. Indeed, the concept of certainty is a virtual prerequisite to encourage the cooperation of home builders, developers, and other private landowners in conservation activities under the ESA.

It goes without saying that private landowners and developers represent a vital component to ensuring species conservation—over 70% of the land in this country, excluding Alaska, is privately owned. Compound this fact with the simple observation that 95% of all ESA-listed species have at least a portion of their habitat occurring on non-federal lands, with 19% occurring only on non-federal lands, and the role of the private landowner in species conservation becomes all the more apparent.[5] In 1982, Congress recognized that private property owners were instrumental to long-term species conservation efforts, but that many regulatory uncertainties posed challenges to their participation. Congress also recognized that the level of certainty regarding the costs and terms of an HCP should be honored by the Federal Government throughout the HCPs implementation. More than a decade later, the "No Surprises" policy was implemented. However, HCPs remain the subject of litigation by groups seeking to overturn the policy. To ensure that the courts do not un-

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[3] *See, e.g., New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.,* 248 F.3d 1277 (10th Cir. 2001), *National Ass'n of Home Builders v. Evans,* No. 00-CV-279, 2002 WL 1205743 (D. D.C.).

[4] 64 Fed. Reg. 36453 (July 5, 1999).

[5] Wilcox, D., M. Bean, R. Bonnie, and M. McMillian. 1996. Rebuilding the ark: toward a more effective Endangered Species Act for private land. Environmental Defense Fund, Washington, D.C. *cited in* Hitly, J and A.M. Merenlender. 2003. Studying biodiversity on private lands. *Condervstion Biology* 17: 132-137.

dermine "No Surprises", Congress should confirm its original intent and codify the existing policy as part of the ESA to give private property owners, State and local governments, and community organizations the necessary certainty to continue their species conservation efforts.

HCPs can help to bridge the gap between two often competing public policy objectives—housing and community growth and protecting and conserving habitat. Indeed, a NAHB analysis of the U.S. Fish and Wildlife Service HCP database indicates that, as of 2003, the three fastest growing regions in the country, the Southeast, the Southwest, and the Pacific regions, combined have over 61% of the nation's housing starts and nearly 94% of the nation's HCPs.[6] While the following examples provide tangible, specific insights into the conservation benefits of several HCPs in the State of California, they are but a snapshot of the substantial environmental benefits of the hundreds of HCP planning efforts found across the country:

East Contra Costa County Habitat Conservation Plan (Contra Costa County, California). Although it has yet to be finalized, the 175,804 acre East Contra Costa County Habitat Conservation Plan has been in development since 2000, and is slated to cover 28 listed and unlisted species. The Home Builders Association of Northern California (HBANC) has been actively involved throughout the planning process, despite an anticipated $20,000 or higher per acre habitat acquisition and maintenance fee (levied in addition to other impact fees that exceed $75,000 per house). The builders' support, despite such a hefty fee, is directly tied to the HCP's promise of regulatory certainty—builders are being told where to build and where not to build, are being informed of their obligations up front, and are even being offered the hope of permit streamlining.

Central/Coastal Natural Community Conservation Plan (Orange County, CA). This plan, approved in July 1996, establishes a 37,000-acre habitat reserve system encompassing a large percentage of the coastal sage scrub system in a portion of Orange County, thus providing for the protection of California gnatcatcher and other sage scrub -dependent species. This HCP also created a ten million dollar endowment for the purposes of ongoing management of the reserve area. This HCP illustrates the unique ability of HCPs to protect and conserve habitat that would otherwise remain unregulated under the taking prohibitions as many thousands of acres preserved in the Central/Coastal Natural Community Conservation Planning Program (NCCP) reserve system are beyond the regulatory reach of Section 9 of the ESA.[7] A similar plan is in development for the southern portion of the County.

San Diego County Multi-Species Conservation Plan (San Diego, CA). This plan was approved by the Service in June 1997. It establishes a 165,000 acre reserve system in southern San Diego County. The reserve is established and funded principally through contributions by the development community. The plan is implemented through detailed "sub-area" plans within the various land-use jurisdictions in San Diego County.

Western Riverside Multi Species Habitat Conservation Plan (Riverside County, CA). The Western Riverside Multi Species Habitat Conservation Plan is a multi-jurisdictional planning program that includes the County of Riverside and 14 local jurisdictions. The plan covers 146 species. State and Federal funds, as well as development impact fees, will help purchase 153,000 acres to supplement 350,000 acres already publicly owned or protected. The resulting 500,000 acre reserve will provide habitat areas, as well as corridors allowing animals to travel throughout their ranges.

Importantly, all of the above HCPs include voluntary commitments by private landowners to accept significant restrictions on the use of their land and to make other contributions to habitat conservation. In the Central/Coastal NCCP, for example, the major landowner agreed to dedicate for permanent protection 21,000 acres of land to habitat conservation purposes. These dedications are occurring well in advance of the development that is authorized under the NCCP. Thus, the conservation benefits of the plan will be realized in advance of the impacts of the development authorized by the plan.

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[6] http://www.nahb.org/hcp

[7] For a more comprehensive discussion of the NCCP effort in southern California, *see* Committee on Scientific Issues in the Endangered Species Act, *Science and the Endangered Species Act,* (NATIONAL ACADAMY OF SCIENCES 1995), at 84-89.

III. INCENTIVES MUST BE BROADENED IN SCOPE AND AVAILABILITY

Recent realization of the vital role that private landowners play in endangered species conservation has led to an associated increase in the number of tools available to encourage their cooperation. Unfortunately, the availability of these few tools barely scratch the surface of what is truly needed to both fully encourage private landowner cooperation and sufficiently protect species under the care of the ESA.

A. Increase the Availability of Incentives

Proactive, incentive-based conservation tools help to integrate species needs into long-range individual and community development plans, a process that lends itself to more flexible, efficient, and effective conservation strategies than the traditional species-by-species approach. In particular, HCPs, Safe Harbor Agreements, and Conservation Banking initiatives have all emerged as possible avenues by which to conserve endangered and threatened species while working with or alongside private landowners. From the home builders' perspective, HCPs have become integral components of species conservation efforts nationwide, and despite ongoing legal challenges to components of the HCP program, are one of the few regulatory mechanisms under the ESA that are supported by a wide-variety of environmental and industrial interests. Conservation Banking has likewise gained in popularity over the last few years and, with it, the presence of endangered species in some areas has been transformed from a liability into an asset. Across the country, interested parties have set up conservation banks to protect the red-cockaded woodpecker, the gopher tortoise, and several species of vernal pool plants and animals, just to name a few.

Unfortunately, participation in these programs is by no means an inexpensive undertaking, especially when dealing with regional, multi-species plans. Because the benefits of species protection accrue to the public at large as well as the property owner, there is no reason why the costs of conservation should not be shared. Recognizing this, there are currently funding opportunities for States and territories under the Habitat Conservation Planning Assistance and HCP Land Acquisition Grant programs. Unfortunately, very few options exist to provide funding assistance for small property owners. To encourage private landowner participation in the HCP program, as well as other voluntary programs and agreements, and garner the greatest possible benefits, financial options must be considerably improved and expanded.

While providing extensive conservation benefits, other incentive-based programs such as Safe Harbors and Candidate Conservation Agreements remain difficult or unwieldy undertakings for builders and developers. Although their use by other industries and interests provide very real and tangible success stories, efforts need to be made toward creating and implementing additional tools and programs that can be used by the development community. Oftentimes working in areas of high land values and with smaller parcels under a patchwork of ownerships, home builders face different "real-world" requirements and pressures than other private landowners or industries. Crafting policies to meet these unique needs, emphasizing flexibility in development and certainty in implementation, can only further conservation efforts under the ESA.

The few aforementioned programs offer some avenues for cooperation under the ESA, but there remains a critical need for expanded incentive-based species conservation policies and programs. Streamlined permitting processes, regulatory certainty, and financial incentives all deserve serious consideration if the ESA is ever to be truly successful in meeting its goals of protecting this nation's biological heritage. Under the onerous weight of inflexible outdated command-and-control regulations and requirements, the ESA will continue to be more about controversy than conservation from the private landowner perspective.

B. Decrease the Number of Disincentives

The availability of incentives under the ESA is but 1 component needed to promote increased cooperation amongst private landowners and developers. The removal of disincentives under the Act remains an equally important aspect of commonsense conservation policy. By minimizing the threat of litigation, streamlining the permitting process, and decreasing the risk of increased future liability for proactive conservation efforts, incredible headway can be made into lowering the "cost of doing business" under the ESA.

First and foremost, the specter of critical habitat threatens the viability of individual HCP efforts and endangers the larger program as a whole. Using the East Contra Costa County HCP as an example, the HCP planning area overlaps with proposed critical habitat for the California red-legged frog, the California tiger salamander, the Alameda whipsnake, and already designated fairy shrimp habitat. Al-

though several environmental groups have taken an active role as stakeholders in the HCP development process, other, litigation-driven organizations have not. Following the aforementioned Gifford Pinchot case that called the conservation obligation of critical habitat into question, home builders are loathe to commit to the HCP process knowing that a lawsuit will almost certainly be filed over the regulatory review and protection requirements of critical habitat by non-participants to the plan.

To compound matters even otherwise-interested landowners and developers are at times discouraged from participating in species conservation programs when faced with uncertain permit approval timelines, unacceptable associated permitting costs, or inflexible regulations. For example, analysis of the FWS database indicates that, on average, the HCP approval process takes nearly 2 years (642 days or 1.76 years) from HCP development to FWS permit issuance. More than half of this time (399 days) occurs during the informal review and discussion stages surrounding development of the HCP prior to its submittal. In fact, for some NAHB members in Alabama, approval times for half-acre HCPs extended well beyond 3 years. For small builders, such delays are not just costly, but can be crippling to a business. The development of an HCP is clearly a significant undertaking. Without certainty or predictability in the approval process, or enforceable review deadlines, costs can be driven so high as to discourage their widespread use.

One possible solution to reduce the number of disincentives is to ensure that recovery obligations are not transferred to private landowners. H.R. 1299 takes a step in this direction by clearly stating that recovery plans are non-binding guidance. Serious consideration should also be given to reforming and revising programs such that interested parties are not flat-out penalized for their proactive conservation efforts. Although a mere beginning, exempting voluntary conservation actions, including HCPs and Safe Harbor Agreements, from the onerous restrictions of critical habitat is one such reform that would do well to quell remnant fears of future regulation and encourage further enrollment in these important programs. Again, H.R. 1299 takes great strides in this direction, and NAHB strongly reiterates its support of the bill. With specific regard to the HCP program, including hard and fast deadlines would help to encourage landowner participation. Such mandated time frames would provide property owners with predictability and a greater understanding of the time and expenses required under the HCP permitting process, thereby encouraging further participation in the program.

C. Adopt a Cost-Effective Approach to Regulation

Beyond increasing the number of incentives available to private landowners and decreasing the number of disincentives, enforcement of ESA regulations and provisions should fully incorporate a cost-effectiveness approach. By weighing the economic costs and biological benefits of ESA actions and their alternatives, least-cost solutions can be reached. This will minimize costs and distribute burdens most fairly across the spectrum of affected communities, industries, firms, and landowners, all the while meeting species conservation goals. Whether pertaining to critical habitat designation, mitigation requirements, or recovery planning, determining the least-cost approach would conserve precious human and financial resources while reducing the impact to both the regulated community and the Services alike.

One clear mechanism to reduce redundancies and increase efficiencies is to increase coordination and consolidate the various non-ESA programs that both regulate land use and help to promote and fund proactive species conservation programs. Incorporating other regulatory programs into the HCP planning process, upfront, such as U.S. Army Corps of Engineers Section 404 wetlands permits, would streamline the permitting process and vastly increase the tangible incentives available to participating landowners and developers. Furthermore, although there is a universal body of work to benefit and conserve endangered and threatened species being done under the rubric of other State and Federal laws, plans, and programs, tying these actions back to the day-to-day regulatory requirements of the ESA remains a murky undertaking. To use the U.S. Fish and Wildlife Service's Partners program as an example, coordinating Partners-funded restoration projects with individual Section 7 consultations or HCPs could expand the reach and scope of any mitigation undertaken as a result of the ESA's regulatory requirements. As a result of such coordination, an increased availability of Agency expertise and funding could allow the landowner to make increased contributions to species conservation over minimum requirements.

CONCLUSION

Mr. Chairman, in conclusion, NAHB believes the time is right to update and modernize the ESA so that it can work better for species and landowners. Landowner incentives can, and should, be a vital component of any legislation to improve the

Act. For the majority of the ESA's history there has been little if anything under the Act to actively encourage landowner cooperation. These glaring shortfalls threaten to hamstring the ESA in the coming years. NAHB accordingly believes that only by addressing these concerns now, proactively, will species conservation efforts be successful.

Chairman Chafee, and members of the Committee, I thank you for your consideration of NAHB's views on this matter, and hope that as a result of your efforts, and that of this Congress, endangered species conservation in this country becomes less about litigation and gridlock and more about common-sense conservation policies and programs.

STATEMENT OF ALAN FOUTZ, PRESIDENT, COLORADO FARM BUREAU

My name is Alan Foutz. I am a farmer from Akron, CO. I serve as President of the Colorado Farm Bureau and serve on the Board of Directors of the American Farm Bureau Federation. I am here today to testify on behalf of both organizations.

Farmers and ranchers have been adversely impacted by the Endangered Species Act (ESA) for a number of years. We have 33 listed species in Colorado, ranging from 2 distinct population segments of gray wolves and the Canadian lynx to the boneytail chub. I won't dwell on the problems, however, but will focus instead on a process that has worked for us and that we consider a possible solution to Endangered Species Act issues.

The mountain plover is a small shorebird found in the western Great Plains. It was proposed for listing under the ESA in 1999. As with many such species, little was known scientifically about the bird. It was believed that conversion to agricultural lands destroyed plover habitat, and it was feared that a listing would have severe impacts on agriculture. Scientists really didn't know much about the bird, however, because it was believed that many lived on private lands and private landowners were reluctant to let State or Federal officers onto their land.

But private landowners also did not want to see the plover listed without scientific justification for listing. The Colorado Farm Bureau Board of Directors determined that it was important to find out the status of the bird, and that meant identifying and studying plovers on private lands.

Convincing our members to open their lands to researchers to study plovers was a tough sell. Not because our members did not want to protect and enjoy plovers on their lands, but because of the restrictions that would be placed on their lands if the species were listed and their land identified as habitat. To our members' credit, they recognized the need for good scientific information. Colorado Farm Bureau entered into an agreement with the Colorado Division of Wildlife, the Fish & Wildlife Service, the Rocky Mountain Bird Observatory and the Nature Conservancy to open their lands to the inventory and study of mountain plovers.

The result was a three-year study of movements, locations and nesting behavior of mountain plovers on agricultural lands. Colorado Farm Bureau members provided access to over 300,000 acres of their private lands for the study. Participation was strictly voluntary. Farm Bureau members donated access to their land as well as their time as field volunteers to the research effort.

Some of the results were surprising. Researchers found that rather than agricultural lands destroying habitat, they actually provided important nesting habitat for the species, and that many of the agricultural practices that would have been restricted under a listing were actually beneficial for the plovers. One aspect of the study found higher nesting success on cultivated agricultural lands than on native rangelands.

Mountain plovers were still at risk from farm machinery plowing inhabited fields. Farmers are more than willing to avoid nests, but they often cannot see nests while operating large machinery. To remedy that situation, the Farm Bureau and the Rocky Mountain Bird Observatory developed a unique program to allow farmers to call a toll-free number 72 hours before plowing. The Observatory would send someone to survey the field and flag plover nests, allowing farmers to avoid flagged nests.

As a result of these and other conservation efforts, the Fish & Wildlife Service determined that listing the mountain plover was not warranted, and they withdrew the proposal. Farmers benefit because they can continue their operations. The mountain plover benefits because its nesting habitat is enhanced by certain agricultural practices.

Colorado farmers and the Colorado Farm Bureau learned some valuable lessons from this positive experience. First, we demonstrated that farmers and ranchers will work to protect species and are willing to meet halfway if government officials are

also willing to meet halfway. Second, flexible cooperation between landowners and the services is the best way to make the ESA work for landowners and promote species recovery. Third, we all learned that practical solutions to potential conflicts do not need to cost a fortune, but might be as simple as a toll-free phone call. Lastly, we all learned the value of obtaining good scientific data to combat real problems, not hypothetical ones.

Based on our experience with the mountain plover, Colorado farmers who were once reluctant to open their lands are now enthusiastically participating in local working groups to help conserve the greater sage grouse.

This solution would not have been available to us if the mountain plover had already been listed. Under the ESA, once a species is listed, Section 9—taking prohibitions—and Section 7—consultation requirements—impose restrictions that stifle the kind of creative solutions that we employed to assist the mountain plover. Furthermore, had the mountain plover already been listed, we would not have been able to develop the scientific knowledge about the plover that could guide in its recovery. The same stereotype about agricultural lands encroaching on plover habitat would have been perpetuated upon listing, to the detriment of farmers and plovers alike.

The ESA needs to be amended to provide flexibility to farmers, ranchers and the government to enter into voluntary agreements to protect and enhance already listed species on private lands in return for some incentive for the landowner. That incentive might be direct payments, tax credits, or simply the removal of disincentives and restrictions under the ESA. Our experience in Colorado has shown that farmers and ranchers want to protect species.

Almost 80 percent of all listed species occur to some extent on privately-owned lands. Nearly 35 percent of listed species occur exclusively on privately-owned lands. This indicates that farmers and ranchers are doing a good job in protecting species on their lands. They need the tools to be able to do it better.

Farm Bureau has long supported the use of cooperative conservation as a way to implement the Endangered Species Act. We are convinced that cooperative conservation is the way to make ESA work for both landowners and for species, producing a "win-win" situation for both. It has certainly worked for us in Colorado with the mountain plover and, we hope, with the greater sage grouse.

IN GENERAL, ANY ESA COOPERATIVE PROGRAM SHOULD

- Be voluntary with the landowner.
- Focus on providing active species management. Projects should emphasize innovative active improvements or active management activities, instead of just passive management through restrictions on land use.
- Not focus on sales of lands or purchases of easements.
- Incorporate removal of existing regulatory disincentives, such as land use restrictions. Many landowners would more readily accept removal of ESA restrictions instead of incentive payments. "Safe Harbor" and "No Surprises" agreements and incidental take agreements should be explored whenever appropriate.
- Recognize plans that are locally developed. People at the local level have better knowledge of the landscape, needs of species that inhabit the landscape and needs of landowners. They are also more focused on developing practical solutions to ESA problems.
- Be flexible with the landowner and the Agency. Landowners can develop creative solutions for ESA situations that should be recognized. In addition, different landowners have different needs that could be addressed through different types of incentives. The landowner should have a wide array of incentives from which to choose.
- Be exempt from critical habitat designation. Critical habitat is designed to encompass lands "that may need special management" protections, such as provided by cooperative conservation agreements. To include land covered under cooperative conservation agreements in critical habitat would be redundant and counterproductive.
- Provide certainty to the landowner that once an agreement is in place, no further management obligations or restrictions will be imposed. The same "No Surprises" policy that applies to habitat conservation plans should be applied as well to all cooperative conservation agreements.

We have some specific ideas for possible legislation that we would be happy to discuss further with the committee. Thank you for inviting me to testify before the subcommittee on this important topic.

STATEMENT OF ROBERT J. OLSZEWSKI, VICE-PRESIDENT ENVIRONMENTAL AFFAIRS

Good morning Mr. Chairman and members of the Committee.

I am Robert Olszewski, Vice-President of Environmental Affairs for Plum Creek Timber Company, Inc. Plum Creek is the largest private timberland owner in the United States with nearly 8 million acres in 19 States. Owning this vast resource base of some of the world's most productive timberlands allows our 2,000 employees to produce and sell forest products for a variety of markets. I have worked for State Government, industry trade associations and private industry on forestry and environmental issues for the last 25 years.

I am here today to talk about Plum Creek's experiences working within the Endangered Species Act to develop a variety of conservation agreements and plans to address both the biology and business of managing forest habitat for endangered species. The Nature Conservancy estimates that half of the country's 1,263 federally listed species have at least 80 percent of their habitat on private lands. Habitat for more than a dozen species currently protected under the Endangered Species Act can be found on Plum Creek lands including northern spotted owls, marbled murrelets, grizzly bears, gray wolves, bald eagles, red-cockaded woodpeckers, bull trout and pacific salmon.

Plum Creek is no stranger to conservation planning under the Endangered Species Act. Over 2 million acres, nearly a quarter of our corporate ownership nationwide, is under four Habitat Conservation Plans and a conservation agreement for grizzly bears in Montana.

Plum Creek's Central Cascades HCP, a 50-year plan covering 315 species on 121,000 acres in Washington State, was approved in 1996 and is now in its 9th year of implementation.

The Native Fish HCP, covering 1.4 million acres in 2 northwestern States, is a 30-year plan that addresses the needs of 8 species of native trout and salmon and is now in its 5th year of operation. This HCP was the first one in the country to incorporate the Services' "Five Points Policy".

Plum Creek is the largest private landowner in the Wisconsin statewide HCP for the karner blue butterfly.

In 2001, the company completed a 30-year HCP for the red-cockaded woodpecker in Arkansas covering 261,000 acres.

Plum Creek manages 75,000 acres of our land in Montana's Swan Valley under a grizzly bear conservation agreement with the U.S. Fish and Wildlife Service, the U.S. Forest Service and Montana Dept. of State Lands. This agreement was completed under Section 7 of the ESA and has been in place since 1995.

These agreements were not easy to complete. The commitment is expensive, time-consuming and requires us to open our operations to public scrutiny in an unprecedented fashion. They have worked successfully for Plum Creek because of the location and characteristics of our land ownership.

But these voluntary conservation agreements under the ESA have indeed solved problems. The listing of the northern spotted owl in 1990 and subsequent Federal "guidelines" trapped over 77% of Plum Creek's Cascade Region in 108 owl "circles." Indeed, with every new listing, Plum Creek was skidding closer to becoming the "poster child" for the taking of private lands. For us, the answer was the advent of HCPs and other agreement tools combined with incentives such as the "No Surprises" Policy. Plum Creek and the Federal Government have accomplished concrete contributions to the conservation of endangered species.

Our HCP's and conservation agreements have been in place long enough to see the progress made on the ground. In our Native Fish HCP, over 5600 miles of logging roads have been "reconditioned" with surfacing and drainage to reduce sediment leading to fish-bearing streams and improved fish passage with use of "fish-friendly" culverts and bridges. Conservation commitments in the Arkansas red-cockaded woodpecker plan have been completed years ahead of schedule and breeding pairs have been increased from 9 to 17 in Plum Creek's 3,000 acre RCW conservation area.

Mr. Chairman, with proper incentives, these voluntary agreements can lead to even greater conservation outcomes. The Central Cascades HCP provided the stimulus to complete the largest land exchange in Washington since the 1940's, with 39,000 acres transferred between Plum Creek and the U.S. Forest Service. This exchange allowed the Federal Government to acquire more property for backcountry recreation while Plum Creek achieved more efficient operations by consolidating our ownership. The HCP allowed Plum Creek to fully value its land for the exchange without the uncertainty related to the presence and future regulation of endangered species on our property.

With the assistance of Federal funds from the Cooperative Endangered Species Conservation Fund authorized under Section 6 of the ESA, the State of Montana has purchased the largest conservation easement west of the Mississippi River on 142,000 acres of Plum Creek property in the Fisher and Thompson Rivers within the Native Fish HCP. These Section 6 funds, which are granted for land acquisition within HCPs, have also been instrumental in the recent purchase of 1,100 acres of Plum Creek property in northwestern Montana by the Montana Department of Fish, Wildlife and Parks. In the Ouchita River of Arkansas, Plum Creek and the U.S. Fish and Wildlife Service are engaging in the development of a Safe Harbor Agreement for the red-cockaded woodpecker on property adjacent to our HCP. The planning and habitat improvement work now occurring on this 12,000-acre ecologically important area of mixed pine savanna and intermingled bottom land hardwood has the potential to more than double the red-cockaded woodpecker population from 20 to over 50 territories. The potential acquisition of the area by the Upper Ouchita Wildlife Refuge is the greatest incentive driving this ESA conservation project.

Some academics and conservation organizations have been critical of HCPs, citing the lack of "good science" and public involvement in their development. We would like to dispel this myth and offer this example. When Plum Creek created its first HCP in the Washington Cascades, we assembled a team of scientists representing company staff, independent consultants and academic experts. We authored 13 technical reports covering every scientific aspect from spotted owl biology to watershed analysis. We sought the peer reviews of 47 outside scientists as well as State and Federal Agency inputs. We conducted over 50 briefings with outside groups and agencies to discuss our findings and obtain additional advice and input. During the public comment period, all HCP documents and scientific reports were placed in 8 public libraries across the planning area. It is important to note, Mr. Chairman, that all of the science and planning completed in our HCPs and conservation agreements has been made available to other landowners and agencies developing their own conservation plans.

RECOMMENDATIONS

As confident as we are in the value and success of voluntary agreements under the ESA, there are several recommendations we think would make the ESA conservation planning process more "user-friendly" and effective.

First and foremost, more incentives are needed because they fuel the innovation and commitment for private landowner participation. We believe the "No Surprises Policy" should be codified in law. This policy was an important incentive for Plum Creek to embark on the development of its first HCP. These agreements provide more predictable outcomes for the government and the "No Surprises" policy balances the bargain by making it a more secure deal for the landowner. Codifying the "No Surprises Policy" will induce more landowners to work with the Services to develop more voluntary agreements.

Congress must authorize appropriate funding of the Department of Interior's HCP program to continue the important work discussed here. We recommend increased support for Section 6 of the ESA, which includes the Cooperative Endangered Species Conservation Fund to support development of HCPs and land acquisition within functioning HCPs and other conservation agreements. The support of Congress for voluntary endangered species conservation also includes support for the U.S. Fish and Wildlife Service and National Marine Fisheries Service to acquire, train and retain the skilled and seasoned personnel needed to craft and monitor these agreements with private landowners. Mr. Chairman, HCPs and other ESA conservation agreements are not only science plans but also business plans, which commit millions of dollars of a company's assets in a binding agreement with the Federal Government. The stakes are high for both conservation and shareholder value in private timberlands. The substantial commitment made by private landowners to develop and implement these voluntary agreements must be matched by a commensurate investment from the Federal Government.

With regards to regulatory and policy issues, we would like to make the committee aware of two areas of conflicting regulation that significantly complicate and delay the completion of conservation agreements under the ESA. The first is the National Historic Preservation Act, which requires the Federal Government to "authorize and permit" any activity which may adversely affect existing or potential historic sites. When permitting the incidental "take" of habitat under the ESA, the Federal Government believes it is compelled to evaluate the potential of ESA-permitted activities to conflict with NHPA. This sets in motion a process, which can require private landowners to commission expensive surveys of potential cultural and archeological resources on their land, often with extensive delay and no benefit to the con-

servation of either historic sites or endangered species. Congress should pass statutory language, or include in the legislative history to make clear Congress' intent to exempt ESA conservation agreements from NHPA review.

Moreover, the National Environmental Policy Act is triggered by the development of Habitat Conservation Plans, Safe Harbor Agreements and other ESA agreements. We have found the generation of environmental impact statements and assessments under NEPA to be an expensive and redundant process, since the "preferred alternative" is the HCP or other agreement that is already well documented and described as a result of work with the Services. Combined with the complexities of working with 2 Federal agencies like the U.S. Fish and Wildlife Service and National Marine Fisheries Service, NEPA compliance becomes an unnecessary and powerful disincentive for large and small landowners to engage in the ESA voluntary agreement process. Regulatory language should be developed which can require adequate public review and input to ESA voluntary agreements without engaging the landowner and agencies in the parallel and redundant NEPA process.

Mr. Chairman, I thank you for the opportunity to testify before you today. The testimony you will hear today should provide the committee with a better understanding of the variety of ESA voluntary agreements and how they have been applied on our property. I hope my testimony has given you an appreciation of the strategic value of these voluntary agreements for both the conservation of species and protection of resource economies.

STATEMENT OF MR. LAURENCE D. WISEMAN ON BEHALF OF AMERICAN TREE FARM SYSTEM, A PROGRAM OF AMERICAN FOREST FOUNDATION

I am testifying on behalf of the American Forest Foundation, and our American Tree Farm System. The Tree Farm System, founded in 1941, is the nation's oldest and largest community of forest landowners who have each pledged to practice environmentally-sound, sustainable and productive forestry.

Together the 51,000 members of the Tree Farm System own more than 33 million acres of some of the finest, richest forested habitats in the U.S. They are showplaces for what can be accomplished by willing, committed and enthusiastic stewards. For that reason, we welcome the opportunity to appear before this Committee.

In an era when most media attention is focused on National Forests, it is vital that Congress consider both the challenges and opportunities that confront the "majority owners" of America's forests the 10 million individuals and families who own half of our forests, most in small plots of less than 100 acres. While recurrent wildfire on National Forests is a media staple the ecological equivalent of summer reruns few people grasp the ominous consequences of another, much less visible forest health crisis that spreads under the media radar. I refer to the loss of some 2,000 acres of forestland a day to development. That's every day with no time off for weekends.

These forests are critical to our environment, our economy, and our communities. Some 70 percent of our Eastern watersheds flow through these family-owned forests. Two-thirds of the fiber grown for wood and paper products are harvested by these families. Some 90 percent of endangered species find some or all of their habitat on their forests.

All the family forest owners I know recognize that decisions you make in Washington will affect their lands as much or more as the decisions they make around the kitchen table. Let me share some of what we've heard "around the kitchen table" as family forest owners consider endangered species and the laws that protect them.

POLICY SHOULD RESPECT THE POWER OF PRIVATE STEWARDSHIP.

Most family owners rank wildlife, recreation and aesthetics as the primary reason for owning land; most will take steps to leave their land better than they found it. Many would welcome the chance to manage for endangered species. What's lacking, too often, are the knowledge, technical skills and the means to implement practices.

Where knowledge and assistance are provided, and clear pathways for protection marked, owners will respond. Voluntary efforts for the red-cockaded woodpecker have protected 509 groups on 347,000 acres some 40 percent of the known groups on private lands.

PUBLIC OFFICIALS SHOULD RECOGNIZE FAMILY FOREST OWNERS ARE VOLUNTEERS.

They choose to own forestland; they choose to be good stewards. Our first—and biggest—challenge is keeping them on the land. Some, of course, will choose to sell

their property as their family and community circumstances dictate. Many others would prefer to stay on the land, and continue to pass on their family's heritage of stewardship. The key fact to remember is that it's their choice. Not ours. Not yours. The goal of endangered species policy, therefore, should be to make it easier not harder for families to stay on the land, and to exercise their innate impulse for conservation. Family forest owners give back to their communities. Without cash, there's little opportunity for conservation.

Whatever their motives for owning forests, owners need income for taxes and insurance, and to invest in their land. To the extent they believe endangered species conservation may constitute a potential drain on their expected future income, some owners may choose another land use. It's important, therefore, to view species conservation not just as a stewardship responsibility owners willingly accept, but also as an environmental service they provide to their communities a service worthy of public support.

Sadly, incentive programs for forest and species conservation are so meager that many families don't even bother to apply. Last year, more than $4 billion in applications for all conservation incentives went unfunded. Of those that were funded, a tiny fraction supported forest protection. Under EQIP, for example, the largest Federal incentive program, less than 2 percent of expenditures nationwide in 2004 were directed at forest conservation practices. Given that about half the rural land in the U.S. is forested [and not connected to a working farm or ranch], the nation's needs are nowhere near being met.

At the same time, Federal incentive programs are just one tool available to policymakers. As part of a comprehensive endangered species policy, other avenues for compensating owners for environmental services should be explored, including tax policy, extending the Conservation Security Program to forest owners, and the creation of private markets. We should reward family owners for species conservation, not punish them for creating the habitat where these species can thrive. Consistency and certainty breed confidence.

Family forest owners must make decisions that will affect their forests and their families for decades, even generations. Consistent policies and regulatory certainty make it easier for owners to choose conservation. In fact, enacting short-term fixes, or politically-fragile programs may actually de-motivate owners, rather than encourage their commitment to long-term stewardship. The brief, sad history of the Forest Land Enhancement Program the nation's first substantial incentive program aimed solely at family forest owners left many with little confidence that Federal policy would provide a stable foundation for their investments in stewardship.

Likewise, exposing owners to regulatory uncertainty the fear that steps taken to protect species today might not suffice in the future magnifies risk and leaves many owners wary of agreements that might further limit management choices open to their heirs.

Several attempts have been made to remove these uncertainties. Early efforts to set individual Habitat Conservation Plans for small owners have stalled. Few have been accepted, and some owners have spent tens of thousands of dollars and the better part of a decade negotiating their plans an unappetizing prospect for their peers.

More promising [and more appealing to owners] is the emergence of statewide or region-and species-specific HCPs, and Safe Harbor Agreements which ease entry, set clear goals and landowner responsibilities, as well as mutually-agreed to limits on restriction of future use.

PROGRAM SIMPLICITY IS A VIRTUE.

As one Tree Farmer put, "We own this land for three reasons: pride, pleasure and profit. Often, the profit isn't there, but we've gone on. When the pride and pleasure disappear when there's one too many hoops to jump through we'll disappear too."

Right now, funded Federal incentive programs accessible to forest owners for species conservation number about half-a-dozen spread over at least three different agencies. Some are administered through State agencies; others through Federal offices. Most require separate application and operate under different rules.

Simply knowing on which door to knock is a challenge for the vast majority of forest owners. Even more vexing, once you're inside, is the maze of committees, requirements, priorities and application procedures. Alongside well-funded incentive programs, we need simpler procedures and transparent processes perhaps even harmonized programs so that family forest owners can readily find the programs that work for them.

LACK OF FUNDS ISN'T THE ONLY BARRIER TO SPECIES CONSERVATION.

Very often, family owners will implement management practices that protect species simply because they want to because it feeds the pride and pleasure they take in caring for their forests. For them, a primary barrier to action is lack of knowledge about a particular species, its range, and the practices they might implement to support its conservation.

For that reason, we have urged both agencies and the Congress not to shortchange outreach and education programs by counting success only in acres treated through cost-share grants. We understand and support the push for programs that produce real results on the ground. The drive toward easily-measured outcomes as we've seen with the Fish & Wildlife Service's Private Stewardship Grants program may actually reduce the return we can earn on Federal investment in species protection.

Our 6 decades of experience—affirmed by our recent work with Environmental Defense and the Nature Conservancy—leave no doubt that well-informed, well-motivated family forest owners will implement new practices, once they learn how.

Two projects supported in part through recent Private Stewardship Grants demonstrate the power of outreach and education. In Mississippi, Alabama and Louisiana, forest owners who attended field days and received publications now manage more than 10,000 acres to conserve gopher tortoise habitat, while maintaining the productivity of their forests. On average, they plan to share what they have learned with an average of 14 of their neighbors. After a single field day in South Carolina, owners reported using prescribed fire and other practices to conserve at-risk species on 15,210 acres.

IN SUMMARY

Incentives are a vital component of a comprehensive endangered species policy because they recognize and respect the power of private stewardship. They provide one avenue—but not the only one—for achieving some level of public support for environmental services provided by family owners.

Owners in general want to be good stewards, within the boundaries of economic reality. Without adequate cash flow from either forest products or environmental services, it becomes increasingly difficult to sustain forests in the face of burgeoning development.

Current incentive programs, as now organized and administered, are not well-designed for family forest owners. Access is difficult, and funds available for forest conservation are dwarfed by the potential need. Without solid evidence that programs will remain adequately funded—and that rules won't change over time—many owners lack the confidence needed to make decisions that will affect their families, and their forests for generations.

Tying Federal investment to on-the-ground outcomes is vital. The most effective policy will combine incentives with a broad range of information, outreach, education and technical assistance programs.

STATMENT OF THE NATIONAL ASSOCIATION OF REALTORS®

Thank you for the opportunity to submit the comments of THE NATIONAL ASSOCIATION OF REALTORS® for the record of the Senate Fisheries, Wildlife and Water Subcommittee oversight hearing on the Federal Endangered Species Act and incentives for private landowners. THE NATIONAL ASSOCIATION OF REALTORS®, "The Voice for Real Estate," is America's largest trade association, representing 1.2 million members involved in all aspects of the residential and commercial real estate industries.

REALTORS®, are concerned and active members of their communities. They care about a healthy quality of life as well as a vibrant economy, and they are willing to do their part to maintain that important balance. They understand that species protection is a critical element in a community's quality of life.

REALTORS® also understand the importance of a strong economy and the critical role played by the estate industry. A healthy real estate market increases the tax base, creates jobs and provides new housing. In 2005, real estate continues to be on of the bright spots in our nation's economy.

Consequently, NRA supports a balanced Endangered Species Act that accommodates both species protection and economic vitality. The current imbalance in species protection is highlighted by a recent NAR study.

Our study of three counties in the western part of the State of Washington found that the location of properties in areas subject to significant ESA regulation typi-

cally results in lower sales prices to significant ESA regulation typically results in lower sales prices for those properties. The study found these lower prices to be statistically significant and observed in virtually all property types in rural, suburban and urban communities. Of other importance, the study also found a significant negative impact on government revenue from taxes.

NAR policy supports the following amendments to the ESA:

• Use of incentives to private property owners for species protection rather than relying solely on restrictions and penalties.

• Listing of threatened or endangered species and the designation of critical habitat based on verifiable, scientific evidence.

• Notification to private property owners of potential listings, and the proposed designation of critical habitat, which impact their property.

• Increased local involvement in creating and implementing recovery plans.

• Independent peer review of both the scientific evidence and economic impacts of all proposed listings and critical habitat designations.

• Periodic review and expedited delisting of species, and removal of land from critical habitat designation, when supported by verifiable scientific evidence.

Since its enactment in 1973, the Endangered Species Act's list of species in need of protection has continued to grow. However, very little progress in recovering species has been achieved. Only a few species have actually been recovered.

In order to maximize the ESA's potential to protect and recover threatened and endangered species, the focus of the Act must shift to create a partnership between government and its citizens. To that end, the ESA must partner with State and local governments and focus less on top-down regulation and more on bottom-up incentives to property owners. The Act should consider whether private landowner voluntary programs, State/local conservation efforts, and other Federal Agency programs already provide sufficient protections before deciding that a listing is war rented. It should strengthen the authorization for Habitat Conservation Plans (HCPs) by providing a greater level of regulatory certainty, streamlining HCP approvals, and codifying the "No Surprises" policy. Finally, the ESA should encourage State/local government facilitation of voluntary species conservation efforts through new authorization and funding.

Thank you for allowing THE NATIONAL ASSOCIATION OF REALTORS® the opportunity to share our views on the Endangered Species Act. We urge the Subcommittee to undertake a bi-partisam effort and pursue improvements to the ESA that will achieve protection and recovery of threatened and endangered species through a cooperative effort between government and its citizens. We look forward to working with you in support of this effort.

RESPONSES BY MICHAEL J. BEAN TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. In your testimony, you mention that nothing in the ESA compels active land management versus passive "natural state" land use restriction. Would it not be a disincentive to compel private landowners to undertake active land management and also compel them to restrict the use of their property. Would you support removing landowner restrictions on private property if active land management were occurring?

Response. Often the active management needed to sustain or enhance habitats for the long-term benefit of a rare species can have short-term negative impacts on individual members of that species. An example would be the prescribed fires useful in maintaining or enhancing habitats for species such as scrub-associated rare species of Florida or the Karner blue butterfly in New York. Such fires, though practically indispensable to the long-term well-being of these species, may nevertheless injure or kill some individuals of those species. I believe the Fish and Wildlife Service can and should facilitate these sorts of management actions by exercising the authority it already has to relax the regulatory impediments that have discouraged or slowed needed active management. Further, needed active management should be encouraged through positive incentives. The alternative of compelling it through regulatory commands is unlikely to work.

Question 2. In your testimony, you express support for voluntary conservation agreements and landowner agreements with assurances. What about critical habitat designation, would you support excluding land included under an incentive program from critical habitat designations?

Response. I think that greater flexibility in the designation of critical habitat is desirable. The goal should be to ensure that those areas of special significance to the conservation of an imperiled species will be appropriately managed to meet the

needs of the species. If there are adequate mechanisms in place, including those that might be provided by well-designed incentive program to encourage and reward long-term beneficial management, that is likely to be ultimately more important than whether any particular area is designated as critical habitat or not.

Question 3. In your testimony you discuss the need for more inter-Agency coordination of efforts to recover species. How would you suggest Congress act in order to facilitate increased coordination?

Response. I think Congress—and specifically this Committee—needs to demonstrate clearly to the Federal agencies whose actions most frequently or most significantly affect imperiled species that it wants and expects increased coordination and cooperation in the conservation of those species. It can do that most effectively, I believe, by beginning with a series of briefings or hearings focused quite intensively on what is being done well or poorly at present. A result of those briefings or hearings should be a set of specific commitments that the agencies involved agree to undertake within specified time periods. This Committee should then bring the agencies back before it periodically to assess the progress—or lack of it—in meeting those commitments. Failure to meet those commitments should not be disregarded; Agency leaders and Agency budgets should be held accountable.

Question 4. Mr. Bean, in your testimony you refer to the efforts of Oklahoma farmers in planning non-native grasses to control soil erosion. This was certainly a noble goal as cities like Magnum, OK were having dust storms so severe that street lamps came on during the day. You suggest it was a mistake for the farmers to plant non-native grasses in 1985, even though they spread more quickly than native grasses and the cities were in a crisis over soil erosion. Were you aware that, since 1996, farmer in Oklahoma have been planting native grasses as the focus has shifted from the crisis of soil erosion to wildlife conservation?

Response. The planting of native grasses offers both soil erosion and wildlife habitat benefits, whereas the planting of non-native grasses offers soil erosion, but no significant wildlife habitat benefits. The extensive planting of non-native grasses in the initial implementation of the CRP program in Oklahoma represented a missed opportunity to achieve both important soil conservation and wildlife habitat benefits. It is my understanding that native grasses are being more commonly planted today, though non-native grasses are also still being planted. Greater attention to the opportunities to use CRP and other Farm Bill conservation programs so as to achieve both broad environmental purposes and more targeted endangered species conservation purposes is one of the most promising strategies for avoiding conflicts over endangered species conservation efforts.

Question 5. If multiple grants and agencies were to be involved at a single property (*i.e.,* applying for a USDA CRP and FWS Partners grant at the same site for different activities) would you suggest a single streamlined process for both grants?

Response. Yes, I believe that is an idea that should be seriously explored. The agencies certainly have the authority to do that now and should be encouraged to experiment with a variety of ways of accomplishing this objective.

RESPONSES BY MICHAEL J. BEAN TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. You express a need for greater coordination amongst Federal agencies in implementing land stewardship programs that could assist in protecting listed species and you provided recommendations on how to incorporate species protection into existing programs. In your opinion, which land stewardship programs have the greatest impact conservation of listed species?

Response. The programs that currently have the greatest potential for beneficial impact on the conservation of listed species are probably the Farm Bill conservation programs, simply because they have, by far, the most resources and can reach the most landowners.

Question 2. Would you support revising any Department of the Interior or Department of Agriculture grant programs to give priority for conservation actions carried out pursuant to recovery plans approved under the Endangered Species Act?

Response. Yes.

Question 3. Do you think the Administration could do more to encourage private landowner incentives for conservation of listed species, without legislative changes to the Endangered Species Act. If so, what would you propose?

Response. Absolutely. For some species, see the answer to question no. 5 from Senator Chafee, as well as the recommendations of my colleague, Robert Bonnie, in

his paper, "Building on Success: Improving the Endangered Species Act," which can be found at http://www.environmentaldefense.org/documents /3366—Building%20on %20Success.pdf.

RESPONSES BY MICHAEL J. BEAN TO ADDITIONAL QUESTIONS FROM SENATOR CHAFEE

Question 1. In your testimony, you mention the untapped or under-utilized resources contain within the Farm Bill for conserving at-risk species. What are some of the changed that could be made to the existing Farm Bill conservation to provide the necessary incentives for agricultural landowners to protect species on their properties?

Response. Changes that could be made to existing Farm Bill conservation programs to improve the conservation of at-risk species on agricultural and other private lands were described at length in testimony given by my colleague Timothy D. Searchinger in testimony to the Subcommittee on Forestry, Conservation, and Forestry, Conservation, and Rural Revitalization of the Senate Committee on Agriculture, Nutrition, and Forestry on July 26, 2005. I refer the subcommittee to that testimony for a detailed answer to this question.

Question 2. To what extent is Environmental Defense focusing on preventive measures to ensure that species are not placed on the ESA list in the first places opposed to directing limited funding and resources toward recovery of species currently on the list?

Response. We are focused on both of these issues. However, before a species is placed on the ESA list, the responsibility for its consecration and management rests with the States (except in the case of migratory birds and marine mammals). As a result, there are relatively few opportunities available under Federal law to address directly the conservation needs of unlisted species. One thing Congress can do to encourage more attention to this issue on the part of States is to fund adequately the development and implementation by the States of State comprehensive wildlife conservation plans.

Question 3. Why is the recovery of species so difficult? What are the ongoing hurdles to recovery?

Response. Most species are not added to the ESA list until they have been reduced to extremely low numbers and very limited distribution. Often, most of their habitat has been eliminated or severely degraded. Reversing these processes, which have often been ongoing for many decades, cannot be done easily or quickly. For many of these species, basic information about how to effectively manage them is sorely lacking, which may require years of research to elucidate. For a more extended discussion of this issue, see the Environmental Defense paper, The Endangered Species Act: Success or Failure, posted on our web site at www.environmentaldefense.org/documents/4465—ESA— Success%20or%20Failure. pdf.

Question 4. What are your thoughts on ensuring that Habitat Conservation Plans benefit listed species?

Response The single most helpful measure would be to ensure that the duty now found in the ESA that requires agencies to ensure that their actions not jeapordize the continued existence of listed species be clearly understood to bar approval of any habitat conservation plan that would make recovery of the species significantly less likely.

Question 5. In your opinion, is there more that the Administration could be doing right now on private landowner incentives for conservation of listed species without waiting for Congress to make changes to the Endangered Species Act?

Response. Yes, there is much more. Some of the actions it could undertake are described in the testimony referenced in my answer to the first question above. Other ideas are set forth in my 2003 paper, The ESA—Second Generation Approaches to Species Conservation:

Challenges to Making Second Generation Approaches Work, which is available upon request.

Question 6. Would Environmental Defense support the concept of creating a fund to pay for adaptive management to save a species from extinction in the case of an HCP failure to mitigate habitat loss? Let's assume that revocation of the incidental take permit would not be enough to prevent the species extinction, and the no surprises policy would prevent securing funds from the developer. Further, how would a fund of this nature be generated?

Response. In general, we would support that concept, and suggest that the source of the funds be appropriated dollars. One could put the burden of underwriting the fund on HCP applicants, but the disadvantage of doing that is that dollars spent on a fund of this sort are likely to be dollars not spent on up—front conservation efforts in HCPs.

RESPONSES BY MICHAEL J. BEAN TO ADDITIONAL QUESTIONS FROM SENATOR CLINTON

Question 1. Would you support revising any DOI and USDA grant programs to give priority to conservation actions carried out pursuant to recovery plans approved under the ESA?

Response. Yes.

Question 2. Is there more that the Administration could be doing right now on private landowner incentives for conservation of listed species, without waiting for Congress to change the ESA?

Response. Yes. For some specifics, see the answer to question no. 5 from Senator Chafee, as well as the recommendations of my colleague, Robert Bonnie, in his paper, "Building on Success: Improving the Endangered Species Act," which can be found at http://www.environmentaldefense.org/documents /3366—Building%20on %20Success.pdf.

Question 3. How is the Administration's shift to voluntary conservation working? Which species are benefiting from the various grant programs? How can these programs be improved and better integrated with the ESA?

Reponse. The Administration's creation of new voluntary conservation programs, such as the Private Stewardship Grants Program and the Landowner Incentives Program, is a commendable, though still quite small, step. Also welcome is its continued support for the use of safe harbor agreements as an inducement for voluntary conservation efforts. Safe harbor programs are clearly helping the red-cocked woodpecker, northern aplomado falcon, Hawaiian goose, black-capped vireo, and other species. These programs can be improved and better integrated with the ESA by expanding them, Streamlining their successful implementation a higher priority. The Administration could make significant advances in voluntary conservation efforts for rare species conservation while simultaneously advancing other goals such as reducing soil erosion, improving water quality. etc.

RESPONSES BY MICHAEL J. BEAN TO ADDITIONAL QUESTIONS FROM SENATOR LAUTNEBERG

Question 1. Some complain that the private sector is bearing too much of the burden for implementing the ESA. Does that burden compare to the burden on society when we lose a species of animal?

Response. The loss of species deprives society—and future generations—of myriad benefits, potentially including new discoveries useful to medicine, science, or industry, the free "services" provided by healthy, intact ecosystems, as well as aesthetic, recreational, and other values. The loss of species forecloses opportunities to benefit from interstate commerce in as-yet-undiscovered products derived directly from wild species or indirectly from insights gained through the study of such species. Inasmuch as possible, Environmental Defense believes that we ought to try to achieve these myriad benefits to society without unduly burdening the private sector. Accordingly, the principles that have guided our efforts are that we seek to make the Endangered Species Act both more effective in conserving species, and less burdensome for those whom it affects. We encourage Congress to apply the same principles in evaluating proposals for change to the ESA.

Question 2. You mention the endangered bog turtle from my home State of New Jersey, and point out the importance of links between species. How much of our endangered species problem in this country is due to a similar loss of species up the chain?

Response. The bog turtle, like virtually every other imperiled species, is at risk primarily because of one reason: the loss or degradation of its habitat. The only strategies that will successfully conserve imperiled species are to maintain and appropriately manage sufficient habitat to support them into the future.

RESPONSES BY MICHAEL J. BEAN TO ADDITIONAL QUESTIONS FROM SENATOR MURKOWSKI

Question 1. Mr. Bean, you have a commendable history of working with private landowners to develop voluntary conservation measures for endangered species. Would you agree that one of the key elements in making voluntary conservation efforts work is that, in the end, the deal that is struck must make good business sense? How could the Act be improved to understand and accommodate the economics associated with voluntary conservation commitments by private landowners?

Response. Certainly for much privately owned land (*e.g.,* corporate timber land), business considerations are likely to predominate in the determination of whether to enter into a voluntary conservation agreement. For many, if not most, individual or family landowners, however, the reason for owning a parcel of land are often many. They commonly include motivations (such as recreation, aesthetics, family tradition, conservation, etc.) having little or nothing to do with economic return, though few landowners can be indifferent to economic return. In the end, therefore, key to making voluntary conservation efforts work is that they be consistent with the landowner's objectives for the land, which may or may not be primarily economic. That said, however, even for those landowners for which economic considerations are not the overriding concerns, it will almost always be useful to assist the landowner with meeting the costs of management for conservation purposes. Doing so makes more conservation effort possible and demonstrates that the landowner's contribution is recognized as important. The Act could be improved by expanding the range of incentive-based mechanisms it offers, without foregoing regulatory controls where are needed.

RESPONSES BY SARA BRAASCH TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. I have heard from some farmers and ranchers that on some occasions their request for technical assistance from your service triggers the evaluation of a possible section 7 consultation because you are part of a Federal Agency/department. What effect does this have on voluntary conservation efforts, as section 7 consultations, even informal consultation, are notoriously lengthy and contentious processes? Is there a way to avoid this trigger?

Response. NRCS is not required to consult with the FWS or NMFS when NRCS provides technical assistance only, but if that technical assistance is provided so the farmer or rancher can obtain Federal financial assistance, consultation is required if the funded action may affect an endangered or threatened species. If technical assistance alone is provided, NRCS conducts an environmental evaluation to ensure we are providing advice that does not result in unintended adverse effects on any resource. In the case of ESA-protected species, the Agency ensures that when a farmer or rancher carries out the recommendations provided, they will not inadvertently take a listed species or destroy or adversely modify designated critical habitat in violation of the ESA. There may be some instances in which an NRCS State Conservationist may want to seek assistance from FWS or NMFS to better understand the potential impacts of a recommendation, but it is not required.

Question 2. USDA programs appear to be very effective. Are there any regulatory hurdles in using USDA money to conserve species under an act implemented by the DOI?

Response. Many conservation programs that are administered by NRCS have a beneficial impact upon the conservation of endangered species. This beneficial impact is often considered a may affect determination under the ESA consultation regulations found at 50 CFR part 402. Pursuant to 50 CFR 402.14 of the ESA consultation regulations, NRCS must enter into informal consultation on activities that may affect listed species and obtain FWS or NMFS concurrence that the funded activity is not likely to adversely affect any listed species or designated critical habitat. In some circumstances, the requirement to obtain FWS or NMFS concurrence on these activities causes delays in their implementation.

Additionally, because NRCS conservation programs encourage the voluntary adoption of conservation measures that benefit listed species, some landowners have expressed concern that their voluntarily-adopted practices will result in future restrictions on the property's use under ESA. While these landowners can obtain safe harbor assurances from FWS through a Safe Harbor Agreement and associated permit, these assurances involve a lengthy process and do not always correspond well with the program time frames for obligating funds.

Question 3. In your testimony you stated that wildlife is one of the four national priorities in the Environmental Quality Incentives Program? How high is wildlife in the priorities and how much is annually distributed for wildlife conservation?

Response. Natural resource issues relating to wildlife are 1 of the 4 national priorities for EQIP and are addressed primarily under the priority for the promotion of at-risk species habitat conservation. The term at-risk species means any plant or animal species as determined by the State Technical Committee to need direct intervention to halt its population decline. The priority of wildlife among other resource concerns is largely determined by the flexibility afforded to States and local decision makers to utilize EQIP resources to address locally identified priorities and optimize environmental benefits. In fiscal year (FY) 2004, $26,404,293 in cost share assistance was approved to help address wildlife-related resource concerns. Wildlife also benefits from technical and financial assistance that addresses other EQIP national priorities such as water quality and water conservation.

Question 4. I know that the Conservation Reserve Program and the Conservation Reserve Enhancement Program are under the Farm Service Agency but you mentioned them in your testimony. A lot of land is coming out of agricultural production due to these two programs and seemingly lying fallow for periods of 10-15 years. Is this land that could be converted to habitat for the benefit of species?

Response. The Conservation Reserve Program (CRP) requires that land enrolled in the program be protected with vegetative cover. The CRP has enrolled over 35 million acres of land. The program has restored over 1.9 million acres of wetlands, planted over 500,000 acres of hardwoods, and protected over 1.7 million acres of floodplains. These lands provide substantial benefits to many game and non-game species. The U.S. Fish and Wildlife Service estimates that an additional 2.3 million ducks per year are produced from CRP land. CRP acreage is being used to restore Salmon habitat, protect the Lesser Prairie Chicken, enhance Northern Bobwhite Quail and restore the habitat for many other species of wildlife. Wildlife groups and State Fish and Wildlife Agencies have commented that CRP is the most important conservation program for the restoration of wildlife on private lands.

RESPONSES BY SARA BRAASCH TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. NRCS is doing quite a bit to help preserve habitat through incentives provided in the Farm Bill. How does the NRCS manage these programs in order not to duplicate incentives provided by the Fish and Wildlife Service?

Response. NRCS fully supports the President's initiatives on cooperative conservation, and therefore works closely with the FWS, NMFS, and State, Tribal and local agencies to coordinate delivery of its conservation programs. NRCS invites each of these agencies to participate with it on the NRCS State Technical Committee. This Committee provides a forum for development of cooperative efforts to foster the conservation of our Nation's resources, and is a mechanism to ensure the NRCS State Conservationist receives advice that will allow NRCS programs to complement, but not to duplicate, other agencies' efforts.

There are several other mechanisms NRCS uses to ensure that the programs the Agency administers, such as the Farm and Ranch Lands Protection Program (FRPP), GRP, WRP and WHIP, do not duplicate efforts and incentives provided by the FWS, as well. For FRPP, lands enrolled in FWS easements are not eligible to be enrolled in FRPP. Likewise, in the case of GRP, lands enrolled in FWS contracts are not eligible for GRP.

For WRP, the authorizing language contains provisions that require the Secretary of Agriculture to work with the Department of the Interior in implementing the program. In addition, NRCS and the FWS leverage resources to implement projects that are considered high priority by both agencies. Under WRP easement projects, NRCS is considered the landowner for the restoration portion of the project. Therefore, contributions from both agencies may be used to benefit the Federal governments' restoration efforts. However, under no circumstances will the restoration funds expended exceed the cost of the project. In addition, the agencies leverage resources in the management aspects of the program. For example, the Secretary of Agriculture and the Secretary of Interior may agree to the transfer of administrative jurisdiction on certain easement projects around the country. For example, earlier this year, Secretary Johanns and Secretary Norton agreed to transfer administrative jurisdiction of the Glacial Ridge project in Minnesota from NRCS over to the FWS. FWS will now be responsible for managing easement lands as part of the Glacial Ridge National Wildlife Refuge.

WHIP generally caps cost-share at 75 percent. However, in order to capitalize on cooperative efforts, current WHIP policy allows State Conservationists to waive this cost-share limit on a case-by-case basis, where circumstances merit additional cost-share assistance to achieve the intended goals of the project. In these cases, direct Federal sources may contribute to the cost of the practice above the 75 percent cost-share level, up to 100 percent.

RESPONSES BY SARA BRAASCH TO ADDITIONAL QUESTIONS FROM SENATOR CHAFEE

Question 1. In your opinion, where are Natural Resources Conservation Service (NRCS) funds better spent—to prevent species from being listed as threatened or endangered in the first place, such as the case of the Greater Sage Frouse in the western United States where Federal funds were used to improve sage frouse habitat and prevent an ESA-listing, or does NRCS prefer funds to go directly toward the recovery of already listed species, such as salmon in the Northwest?

Response. As the saying goes, "An ounce of prevention is worth a pound of cure." That is true for declining species, as well. Substantial Federal resources are expended during the listing process and to comply with the Endangered Species Act (ESA) after species are listed. Less resources are required to protect and restore habitat before species decline to the level at which their continued existence is in jeopardy. Of course, we cannot ignore the species that are already listed, but both goals are important to address, and NRCS is committed to contributing to the achievement of both goals. Here are some examples of how NRCS does this.

While the Wetlands Reserve Program (WRP) does not have statutory language that requires a focus on ESA-listed species, NRCS considers habitat for threatened and endangered species a priority in the application ranking process. In addition to this focus at the field level, NRCS nationally also focused for the first time in fiscal year (FY) 2005 on enhancement of protected species' habitat. For Example, $500,000 of WRP funding, made available through the Wetlands Reserve Enhancement Program, was specifically provided to enhance Bog Turtle habitat in the Northwestern States, while an additional $500,000 of WRP finding was woodpecker population. The WRP focus on ESA-protected species complements the statutory requirement to focus on migratory birds and other wildlife, which includes declining species.

The Grassland Reserve Program (GRP) emphasized habitat protection to prevent species from being listed as threatened and endangered. As a matter of policy, NRCS considers habitat for "declining populations" of grassland-dependent birds and animals a priority in the application ranking process at the State level, as well as targeting species directly at the national level. For example, in fiscal year (FY) 2004 and 2005, over $5.1 million of GRP financial and technical assistance funds were awarded to seven Western States to acquire easements for the purpose of restoring and protecting Sage Grouse habitat.

Question 2. How closely does the NRCS coordinate with the Fish and Wildlife Service in resolving species conflicts on privately-owned agricultural lands?

Response. NRCS has a positive working relationship with the Fish and Wildlife Service (FWS). The Agency coordinates with the FWS in resolving species conflicts on privately-owned agricultural lands when the landowner has applied for NRCS financial assistance and NRCS has determined there may be an effect on federally-protected species or habitat. In these cases, consultation with FWS is required. Because NRCS programs address private land conservation needs, and because NRCS policy is to avoid or minimize effects on endangered, threatened, or declining species, conflicts arising from NRCS programs often do not occur. NRCS is also sensitive to landowners' interests in maintaining their privacy and the confidentiality provisions of the Farm Bill. NRCS is respectful of landowners' responsibilities to work with FWS or National Marine Fisheries Service (NMFS), as appropriate, on the decisions they make regarding the use of their land as it relates to ESA-listed species.

Question 3. Do any of the NRCS conservation programs authorized by the 2002 Farm Bill or other similar statutes specifically require that the NRCS focus on ESA-listed species?

Respose. The Wildlife Habitat Incentives Program (WHIP) (16 USC 3836a) requires NRCS to focus on ESA-listed species. In addition, the Healthy Forests Reserve Program (HFRP) (16 USC §§ 6571-6578), authorized by Title V of the Healthy Forests Reserve Act of 2003, Public Law 108-148, also focuses potential conservation efforts on ESA-listed species. However, the Administration has not requested, and Congress has not provided, funding for HFRP. The HFRP's statutory purpose is to

assist landowners in restoring and enhancing forest ecosystems to 1) promote the recovery of threatened and endangered species; 2) improve biodiversity; and 3) enhance carbon sequestration. The WHIP statute specifically requires that NRCS focus on endangered species. Excerpts from the WHIP statutes under cost-share payments state:

(1) In General.-Under the program, the Secretary shall make cost-share payments to landowners to develop:

(A) upland wildlife habitat;
(B) wetland wildlife habitat;
(C) habitat for threatened and endangered species;
(D) fish habitat; and
(E) other types of wildlife habitat approved by the Secretary.

While the Conservation Security Program (CSP), Environmental Quality Incentives Program (EQIP), GRP, and WRP authorizing statutes do not directly require NRCS to focus on ESA-listed species, all programs, as a matter of policy, consider habitat for threatened or endangered species or any declining species a priority in the application ranking and conservation planning processes consistent with Section 7(a)(1) of the ESA. Specifically, WRP legislation requires NRCS to focus on migratory birds and other wildlife, whereas GRP's authorizing legislation emphasizes support for plant and animal biodiversity and makes eligible for GRP lands which have potential to serve as habitat for animal or plant populations of significant ecological value—" (16 USC § 3838n)

Responses by Sara Braasch to additional Questions from Senator Clinton

Question 1. Incentive programs at the State and local level, and also national programs like the Farm Bill conservation title programs, can take some of the pressure off the Endangered Species Act, both in a targeted way by providing funds to landowners to protect and restore habitat for listed species on private lands, and more broadly, by helping to keep species from declining to the point where they need to be listed. As the States complete their comprehensive wildlife conservation strategies required under the State Wildlife Grants Program that was established in the fiscal year (FY) 2001 Interior Appropriations bill, wildlife managers should have a better idea of how to target incentives to habitats with listed species, and also to help species avoid being listed. How will you integrate existing incentive programs to accomplish these aims?

Response. The FWS, NMFS, and State Fish and Wildlife Agencies all serve on the NRCS State Technical Committee, where advice is provided to the State Conservationist on how NRCS conservation programs will be delivered within the State and what priorities will be addressed. State Technical Committees: serve as a forum to educate members about NRCS programs; identify ways in which NRCS programs can be implemented to help achieve the goals set forth in States' comprehensive wildlife conservation strategies; and are a place where partnerships can be formed.

Question 2. The demand for conservation incentives is so great that virtually every one of the conservation title programs from the 2002 Farm Bill has a backlog of qualified applicants whose projects cannot be funded in a given year. In 2004, funding constraints prevented the protection of 6.2 million acres of grasslands, restoration of over 530,000 acres of wetlands, and over $10 million worth of projects to improve wildlife habitats. Yet budget proposals continue to fund these important incentive programs at less than was authorized by the Farm Bill. How can this situation be remedied?

Response. Private landowners have been increasingly drawn to the voluntary, locally-led, site-specific conservation assistance delivered by NRCS and its partners. The demand for cost-share, easement and incentive funds provided through NRCS conservation programs currently exceeds available funding. NRCS works to address this high demand for assistance in a number of ways, including, but not limited to, increased leveraging of partnership dollars where authorized, increased technical assistance to landowners, and streamlining measures to reduce technical assistance costs.

Increased leveraging of Federal dollars and lowering the Federal cost-share percentage for conservation practices installed with NRCS assistance allow Federal funds to reach additional landowners and achieve greater conservation benefits per Federal dollar. In addition to increased leveraging of non-Federal dollars, ensuring that landowners whose contracts are not accepted receive sufficient technical assistance is another technique that is critical to improving landowners' chances of receiving funding in the future. Finally, streamlining and efficiency measures identified

and undertaken by the Agency will reduce technical assistance costs. Through improved funding allocation and application ranking procedures, NRCS is committed to funding the highest quality contracts and ensuring that Federal dollars are invested wisely and effectively.

Question 3. How best can we integrate delivery of State, local and the various Federal programs to provide one-stop shopping for landowners who are seeking incentives to protect or restore important habitats for wildlife?

Response. As a full participant in the President's Cooperative Conservation Initiative, USDA works in partnership with States, Tribes, local governments, and individuals to promote conservation efforts. USDA Service Centers, through which NRCS operates in partnership with the Farm Service Agency, Rural Development, Conservation Districts, and often Resource Conservation and Development Councils, are the one-stop-shop for landowners who are seeking program information and assistance to restore wildlife habitat. The locally led process and NRCS State Technical Committees are two mechanisms through which Federal Tribal, State, and local agencies learn about the programs each organization has that contribute to the achievement of wildlife goals. This information can then be shared through pamphlets and brochures, available at USDA Service Centers.

Local work groups, made up of local, State and Federal governmental representatives, assist NRCS in identifying natural resource priorities, leveraging other programs, and recommending ranking and evaluation criteria for applications. This locally led process enables NRCS and its partners to achieve the desired environmental benefits and ensure consistent program delivery to the customer.

The State Technical Committee is a technical advisory committee made up of representatives from other Federal agencies, Tribal and State governments, agricultural, natural resource and environmental organizations. The Committee provides technical advice to NRCS on wildlife protection strategies, and input on streamlined program delivery and effectiveness at the field level.

NRCS's use of Technical Service Providers (TSP) also affords opportunities to integrate delivery and leverage other programs to more effectively and efficiently provide assistance to landowners. To maximize landowners' incentives to hire them, a TSP must be able to provide landowners with information about both public and private sector programs that will assist them in accomplishing their conservation goals, regardless of the source.

In addition to these mechanisms, landowners and other customers can also obtain information and assistance from NRCS' national Web site at: http://www.nrcs.usda.gov. This Web site includes information on program assistance with links to NRCS State Office Web sites and Web sites of NRCS' conservation partners.

Responses by Sara Braasch to additional Questions from Senator Murkowski

Question 1. Section 9 of the ESA, along with implementing regulations promulgated by the Agency, use an expansive definition of a taking of a listed species to include harm, harassment, and activities that change essential behavior or disrupt behavior. If a landowner discovers a listed species on his property, what assurances can the Federal agencies provide the landowner that he or she is free to engage in ordinary uses of the land without being exposed to taking claims and possible prosecution?

Response. When NRCS formally consults with the FWS or National Marine Fisheries Service (NMFS), as required by Section 7 of the ESA, NRCS receives a biological opinion and incidental take statement. Any incidental take of listed wildlife that is in compliance with the terms and conditions of a section 7 incidental take statement is exempt from the section 9 or regulatory prohibitions on take (16 U.S.C. 1536(o)(2)) and would be an important component of any legal defense should third parties seek enforcement of the ESA's take prohibitions. Safe Harbor Agreements with Assurances and Candidate Conservation Agreements (Agreements) are 2 other tools FWS uses to provide assurances to NRCS program participants that they will be free to continue to use their land for farming and ranching. Under these agreements, the Fish and Wildlife Service provides participants with regulatory assurances that they will not be required to provide any additional commitments of money or natural resources if they conduct their activities in accordance with the terms of the agreement. However, these Agreements do not apply retroactively to cover the actions farmers and ranchers have already taken to benefit ESA-protected and declining species. For example, if a listed species were attracted to a farmer's or rancher's land, and that land turned into part of that listed species habitat, there

is a greater chance that restrictions are already imposed on the farmer's or rancher's land use.

Question 2. It is my understanding that efforts to provide administrative mechanisms designed to offer such assurances have been struck down by Federal courts as being inconsistent with the ESA what changes are needed in the statute so that needed landowner assurances can be provided?

Response. As the Federal agencies charged with implementing the ESA, NRCS respectfully defers to the FWS and NMFS to respond to this question.

Question 3. The NRCS has been a key resource for resources conservation activities on private lands. What are the biggest obstacles that the NRCS and Department of Agriculture face in bringing private landowners into resource conservation programs?

Response. NRCS believes there would be positive benefits for incentive-based wildlife conservation from development of programmatic ESA consultation for all Farm Bill conservation programs. Currently, NRCS field staff performs ESA consultation on many activities at the local level, including individual conservation practices. This occurs even in circumstances where there is virtually no potential for adverse effect determination. Consultation requirements greatly increase the amount of time needed to implement even basic conservation practices on farms and ranches, and result in escalated technical assistance costs. Programmatic consultation has the potential to generate significant cost savings for NRCS, as well as other agencies, because of the reduced workload relative to site-by-site consultation. We believe opportunities exist to provide more broadly applicable consultation and look forward to working with our colleagues with the FWS and NMFS on this issue.

Question 4. In your experience, when endangered and threatened species are found on private property, do the take prohibitions of the ESA and potential requirement for Section 7 consultations for Federal Agency actions hinder the ability or willingness of farmers to enter into resources conservation programs?

Response. Sometimes the take prohibitions of the ESA and potential requirement for Section 7 consultations do hinder farmers' willingness to apply for financial assistance through NRCS conservation programs. It is our experience that many landowners are concerned about the possibility they will be restricted in how they can use their land if it becomes known that endangered or threatened species are on their property. They don't want to take the chance, even if the conservation practice they currently intend to install will benefit those species. The concern is that if they want to take some other action in the future, the Federal agencies will know about the presence of the species, and they will be prohibited from doing what they want to do.

RESPONSES BY CAMPOS TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. In your testimony, you mention that the "most important incentive that Congress can give home builders is regulatory certainty" and you go on to express concern about third party lawsuits undermining the administrative practice of "no surprises." What specific steps can we take to ensure that assurances given to landowners are meaningful and concrete so that there are not multiple bites at the apple?

Response. I would suggest three specific steps Congress can take to provide certainty to the regulated community.

First, quite simply, Congress can codify the bipartisan "No Surprises" policy which would help ensure that a deal is a deal. When you negotiate an agreed upon plan for species or habitat management and protection, you need to know that deal is final. Property owners implementing an approved Habitat Conservation Plan (HCP) need to know that they will incur no additional costs or responsibilities in the event that something that is unforeseen occurs. With this degree of regulatory certainty, property owners, builders and developers can undertake long-range planning and development operations confident that the time, money, and effort devoted to creating and implementing HCPs will not be lost because a Federal Agency changes its mind about what a species may need for recovery. Of course, nothing in this policy prevents the Federal Government from addressing the changing needs of a species with its own resources.

Second, Congress can exclude HCPs and other species management and conservation plans from critical habitat designations and thereby provide powerful incentives to private landowners to continue entering into such agreements.

Under the ESA, the Services are obligated to consider whether "special management considerations" in the form of critical habitat are warranted for these specific areas. To demonstrate compliance with this mandate and determine whether any such additional management considerations are needed, NAHB believes that the Services are obligated to consider and review all private, local, State, regional, and Federal protections, including all applicable management plans and conservation agreements to assess the conservation benefits they provide. If a specific area is already managed for the conservation of a particular species, that area is clearly not in need of *additional* protections or management considerations, and therefore fails to meet the very definition of critical habitat and must be excluded from the designation.

Unfortunately, recent litigation has challenged this logical progression, and threatens to undercut the attractiveness and usefulness of the full range of conservation tools and management options available to land managers, private landowners, and developers, resulting in a far-more onerous and far-less effective ESA.

Ultimately, in areas covered by HCPs, Safe Harbor Agreements, and other management plans and conservation programs, the designation of critical habitat only serves to add another layer of review and bureaucracy while failing to afford any additional protections for listed species. It also serves as a disincentive in those instances where voluntary measures are underway. Needless red tape is not a substitute for common sense conservation policy, and may even result in detrimental impacts to threatened and endangered species.

Accordingly, NAHB appreciates the Services recognition of landowner contributions in this regard, and I would note as a matter of reference that the Fish and Wildlife Service for one has exempted approved HCPs from critical habitat designations. In conjunction with § 49(b)(2) of the Act, the Fish and Wildlife Service has cited this very logic in its exclusion of HCPs and other properly managed lands in, amongst others, the proposed designation of critical habitat in Arizona for the Cactus Ferruginous Pygmy-Owl. In that proposal, the Service even went so far as to "encourage landowners to develop and submit management plans and actions that are consistent with pygmy-owl conservation that [the Fish and Wildlife Service] can evaluate and that may remove the necessity of critical habitat regulation."

As these exemptions are more a matter of administration policy and interpretation, and therefore subject to change, NAHB supports the codification of HCP exemptions from critical habitat.

Finally, as I mention in my testimony, a third important reform would be for Congress to reduce redundancies and increase efficiencies by increasing coordination, and consolidating the various non-ESA programs that regulate land use and help to promote species conservation and habitat protection. Incorporating other regulatory programs into the HCP planning process, upfront, such as U.S. Army Corps of Engineers Section 404 wetlands permits, would streamline the permitting process and vastly increase the tangible incentives available to participating landowners and developers. This point—integrating Section 404 permits into the HCP process—is worth repeating: providing for "one stop permitting" in the ESA and Clean Water Act context would be of tremendous benefit for builders. By encouraging advance planning and an ecosystem approach to resource conservation, it would be equally beneficial for species and aquatic resources.

Question 2. In your testimony, you discuss the expense and time consuming nature of participating in voluntary conservation efforts, particularly for small landowners? What suggestions do you have for changes Congress can make that would speed up the process and lower the cost to allow more individuals to participate?

In my response to an earlier question from Senator Chafee, I mentioned that smaller-scale HCPs are underutilized because there is no firm timeline; for their approval and completion. A vast improvement could be made by ensuring a stricter timeline; similar to the Section 7 timeline. This would provide additional certainty for builders and make these HCPs more attractive to smaller builders and landowners.

Question 3. In several places of your testimony, you mention the need for a flexible ESA? Is the current structure a one-size-fits-all construction and what changes can Congress make to allow the tailoring of ESA to site specific concerns?

Response. Flexibility is a somewhat difficult issue to address. As I mentioned in my testimony, builders and developers require certainty. Furthermore, knowing the "rules of the game," the kind of mitigation requirements generally required, etc., can help private landowners plan for future activities. Unfortunately, these guidelines can also pigeon-hole both the landowners and the Services into pre-set courses of action that may or may not be compatible with the on-the-ground requirements at hand. On the flip side, however, broad and unending Agency discretion leaves land-

owners with little or no idea of the ESA's requirements and can facilitate abuse by agenda-driven staffers. What is necessary is an approach that allows for long-term regulatory certainty combined with the flexibility to create projects and programs that meet the needs of all involved stakeholders. While this approach has been utilized in the past, most notably in a few large regional HCPs in my home State of California, the process is still more of the exception than the rule.

RESPONSES BY PAUL CAMPOS TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. In your testimony, you state that the existing Endangered Species Act is burdened by a number of disincentives that discourage landowner cooperation. Could you elaborate on these disincentives and how you would recommend addressing them?

Response. In essence, the disincentives center on two key problems: First, the time and expense required to not only cooperate with the ESA, but especially to voluntarily conserve and protect species. Second, the regulatory uncertainty which burdens the ESA discourages landowner cooperation.

Especially in areas where land costs and land values are high and where species conservation and economic growth and development are intertwined, there is a virtual dearth of programs that allow landowners and businesses to even begin to recoup or recapture the costs of voluntary conservation actions. Complicating issues further is the unfortunate reality that the ESA is burdened by a number of disincentives that actively *discourage* landowner cooperation. All this lies in the simple fact that, for most private landowners, the presence of an endangered or threatened species on their land is still much more of a liability than anything else. Even well-intentioned actions to help protect the species or its habitat may take months or years in Agency review and limit future management activities or land-use options. From the builder's perspective, site surveys are often a large source of the Services' information on species distributions. This often creates a sort of self-fulfilling prophecy, whereby species appear to be focused in areas where growth is occurring simply because this where people are actually looking for the species. Consequently, projects in these areas become disproportionately burdened with species protection requirements.

To address these concerns, Congress should consider acknowledging that every interaction with the ESA is not created equal. Some activities, small project-specific HCPs for example, should require less intensive review than larger programs. Also, landowners willing to undertake voluntary conservation actions should be spared form long permitting delays and project uncertainty. While these are not new concepts, as I suggested in my response to question posed by Chairman Inhofe, they are still more of the exception than the rule.

Question 2. Can you provide a total number of housing developments that have been stopped by restrictions under the Endangered Species Act in Northern California?

Response. I can't provide you with a number of housing developments that have been stopped, if by "stopped" you mean regulated out of existence. I would point out that it is not just developments being stopped that should be of concern to all of us. Just as important are the number of projects that have been delayed and the increased costs associated with those delays—including the substantial delays caused by litigation brought by project opponents that allege impact to species or habitat. Also, I would raise the point that the significant mitigation costs that builder and developers face can significantly reduce the number of housing units available, while also driving up costs. All of these factors not only reduce the number of available units, but also significantly impact affordable housing in this country.

Congress needs to set policies and support programs that increase affordable housing in this country, not raise price for the most vulnerable first time home buyers. With respect to these points, I would urge the Subcommittee to review the recent economic impact analysis released by the Service in connection with its designation of over 800,000 acres of critical habitat for 15 vernal pool species in California. The Service's analysis demonstrates that California's housing market is in severe disequilibrium—demand for housing far outstrips supply—and that the regulatory impact of the ESA is very substantial in terms of causing delays in housing projects, causing housing units to be removed from proposed projects as a direct result of species' habitat needs, and imposing substantial mitigation costs that are passed on to consumers in the form of higher house prices.

Question 3. In your testimony, you cite a need under the Endangered Species Act for monetary assistance to small private landowners to encourage their voluntary participation in the protection of listed species. Are there any specific proposals that you would like the Congress to consider to address this need?

Response. Monetary incentives would certainly help to offset the costs associated with voluntary conservation efforts that landowners undertake, and would encourage further participation. As I mention in my written testimony, proactive, incentive-based conservation tools help to integrate species needs into long-range individual and community development plans, a process that lends itself to more flexible, efficient, and effective conservation strategies than the traditional species-by-species approach. Unfortunately, coordination between ESA and non-ESA conservation programs is lacking, as are approaches specifically tailored to address the needs of small builders and developers. Furthermore, there remains a critical need for expanded non-monetary, incentive-based species conservation policies and programs. Streamlined permitting processes, regulatory certainty, and financial incentives all deserve serious consideration if the ESA is ever to be truly successful in meeting its goals of protecting this nation's biological heritage.

Question 4. In your testimony, you state that Endangered Species Act decisions should be based on "sound science." Given the permanent nature of extinction, do you think that damaging activity on a piece of potentially critical habitat should be deferred until scientifically valid, peer reviewed studies are available, even if this takes many years? If not, should decisions be made on the best available science?

Response. Not knowing what "damaging activity" you are referring to on potentially critically habitat, it is difficult to comment on your hypothetical. With regard to the important issue of sound science however, as you know, the ESA calls for the use of the "best scientific data available", however there is no definition of this phrase within the Act or in implementing regulations. Therefore, NAHB believes that reforms are necessary to define what constitutes the phrase "best scientific data" and to ensure that ESA decisions are made stronger and more defensible, while providing protection to our threatened and endangered species.

Currently under the ESA, a species can be listed as endangered or threatened based on one letter from a landowner claiming that "there are less of the species than there used to be." The golden-checked warbler was listed on the basis of one letter from a private individual. This is unacceptable. Although this type of information may constitute "best science available" under the current ESA, the agencies should not be allowed to continue to make such fundamental and important decisions based upon such a blatant lack of information about the species. Petitions to list a species should be founded on clear and convincing evidence that a listing is warranted.

There are other important decisions made by the Federal agencies that are based on flawed or absent data. For example, as a result of a lawsuit brought by NAHB and 17 other organizations and municipalities, the National Marine Fisheries Service agreed to rescind its critical habitat designations for 19 salmon and steelhead species in the Pacific Northwest due to the lack of science and proper economic considerations. In 2000, NMFS designated critical habitat for these populations covering 150 watersheds over the States of Washington, Oregon, Idaho, and California. Thousands of our members within this four-state area were encompassed by this over-broad and expansive designation. Many of their projects were prevented or were subjected to expensive mitigation requirements.

NAHB strongly believes that sound science reform is overdue and that Congress should act now to prevent these grievous errors from happening again. ESA decisions have far-reaching consequences for the public. Therefore, the Federal agencies must be able to support these decisions with sound and defensible science to justify that the hardships inflicted on the public are absolutely necessary to protect and conserve these species.

Furthermore, it is extremely important that peer review of science take place outside and independent from the Agency making the policy decision. Additionally, it is vital that the review encompasses the materials used to support the decision. For example, review of an ESA jeopardy determination will not reveal the fundamental problems with the science unless all documentation used to reach that jeopardy determination can also be examined and reviewed. Likewise, not only should a proposal to list a species be reviewed, but also the underlying biological data, including any species counts, population models, and other relevant information used in that listing decision.

RESPONSES BY PAUL CAMPOS TO ADDITIONAL QUESTIONS FROM SENATOR CHAFEE

Question 1. One of the concerns you expressed was the overlaying of critical habitat designations with Habitat Conservation Plans? Would you go into more detail as to your concerns in relation to the overlay problem and how this is impacting housing development on the ground?

Response. Yes, Mr. Chairman, this issue is of significant concern for our industry, especially in light of the substantial uncertainty caused by the Gifford Pinchot decision in the 9th Circuit. If an approved or pending HCP falls within existing critical habitat, or subsequently has critical habitat overlaid over the area it covers, it will be subject to the additional regulatory requirements and red tape of critical habitat that have little or no benefit to listed species. Any incentive to enter into an HCP is lost if the area at issue is also subject to regulation under the critical habitat provisions of the ESA. In the wake of the Gifford Pinchot decision, many developers and builders are now asking themselves if the significant time and expense that is required to undertake an HCP is worth it given the considerable uncertainty the decision has caused.

For instance, as I stated in my testimony, using the East Contra Costa County HCP as an example, the HCP planning area overlaps with proposed critical habitat for the California red-legged frog, the California tiger salamander, the Alameda whipsnake, and already designated fairy shrimp habitat. Although several environmental groups have taken an active role as stakeholders in the HCP development process, other, litigation-driven organizations have not. Following the aforementioned Gifford Pinchot case that called the conservation obligation of critical habitat into question, home builders are loathe to commit to the HCP process knowing that a lawsuit will almost certainly be filed over the regulatory review and protection requirements of critical habitat by non-participants to the plan.

It is thus imperative for Congress to authorize explicitly in statute the Service's practice of excluding pending and approved HCP's from critical habitat. That practice is now being challenged head on by the Center for Biological Diversity, which has filed a 60-day notice of intent to sue over the Service's exclusion of HCPs from critical habitat.

Question 2. You mentioned that the timing of the HCP permit process is a disincentive for builders and developers to participate in conservation programs. In light of this, are there changes that could be made to the permit process to make it easier for developers to work within their unique timelines?

Response. Yes, especially for project specific HCPs. These smaller-scale HCPs are underutilized because there is no firm timeline for their approval and completion. A vast improvement could be made by ensuring a stricter timeline; similar to the Section 7 timeline. This would provide additional certainty for builders and make these HCPs more attractive to builders.

Question 3. You cited Safe Harbor and Candidate Conservation Agreements as programs where there is room for improvement in relation to encouraging builders and developers to buy into the process. Would you speak further about the types of additional tools that could facilitate their participation, particularly in areas where high land values pose additional challenges?

Response. Safe Harbor Agreements are testaments to the common-sense conservation approaches that the ESA is capable of generating. However, given the specific nature of the home building industry, the particular approach, requiring sustained on-going management, is oftentimes unworkable to builders and developers. Furthermore, non-ESA programs such as the USDA's Conservation Reserve Program provide interesting models on how to encourage private landowner conservation, but do not possess sufficient funding levels to offset the costs of voluntary set asides in competitive housing markets like those found in Northern California.

In order to be useful to builders and developers, any additional tools or incentives under the ESA would need to help to recoup the costs of doing business under the Act. Given high land values in competitive and growing areas around the country, however, this need not always be through direct compensation. Thought should be given to providing incentives through certainty and streamlined permit approval processes.

That said, I would also like to reiterate the point I made in my testimony that most regional HCPs act as a sort of candidate conservation agreement because they treat covered but unlisted species as if they were listed and thus provide all of the regulatory protections of the act and resources for long term active management.

RESPONSES BY CAMPOS TO ADDITIONAL QUESTIONS
FROM SENATOR MURKOWSKI

Question 1. The prohibitions on taking and the related threat of criminal or civil prosecution are the big sticks" in the ESA with respect to the treatment of issues that occur on private lands. Many property owners view them with understandable apprehension. Do you see a need or benefit to amending the law to better define the situations in which these sticks should actually be used?

Response. Definitely. The ESA is a powerful and far-reaching statute. Unfortunately, all-to-often, builders and developers have witnessed what can only be called abuse of power by individual staff members and offices. Often coming in the form of presumed take letters, builders, developers, and even local and county governments have received general notices that they are in danger of taking a species. These letters imply an air of guilty until proven innocent, and seem plainly intended to intimidate landowners and local officials into conceding to the Services' demands. In order to help reduce the flaunting of the ESA's big sticks, one suggestion would to be a formal system for vetting such letters and notices through the Services' chain of command, so that individual staffers or offices do not improperly wield the Act.

Question 2. In your view, would it improve the ESA to include incentives for landowners to manage their lands and activities in ways that are more hospitable to listed species? If so, what kind of incentives do you think might be appropriate?

Response. As mentioned above in my response to a similar question from Senator Chafee, thought should be given to other, non-financial incentives such as permit streamlining and regulatory certainty. In competitive housing markets, these can be powerful incentives, and potentially more practical than direct funding.

Question 3. Current law allows anyone, even the most radical animal rights or environmental group, to take individual citizens to court for alleged "taking" even where the rationale is extremely flimsy. In your view, has this practice been abused?

Response. I do see litigation abuses in under the ESA. The Services do not have the resources, both in terms of time or dollars, to do everything they must under the Act exactly when they are supposed to it. There are many groups that take advantage of this by litigating simply for attorney's fees. Oftentimes, these are slam-dunk lawsuits the ESA says do X, the Services did not do X by an arbitrary date, court order issued and attorney's fees awarded. Unfortunately, the Services do not have adequate resources to complete all of these statutorily-required obligations, so the litigation mill continues. While there are differences between this type of litigation and those brought by private citizens in cases where the Services have gone through the motions of meeting their ESA responsibilities but failed in substance (*i.e.,* the conducting of *proper* economic analyses), Congress must at least be sure that the Services have the necessary resources to meet their responsibilities lest the downward spiral of litigation continue.

Question 4. What suggestions do you have for providing landowners with an assurance that they are not going to become a victim of this practice sometime in the future?

Response. I'm not sure I have any specific suggestions at this time, although so-called Loser Pays provisions have been somewhat effective at discouraging frivolous lawsuits in other areas.

Question 5. Some outside parties have suggested that we don't need to update or improve the ESA but just need to comply with the existing law and fully fund ESA programs. As representatives of landowners and companies who have to comply with the ESA on a day to day basis, do you agree that the ESA, in its present form, is sufficient?

Response. No, the ESA in its present form is not sufficient. Less that 1 percent of species listed for protection under the Act have actually been recovered. In the mean time, landowners and others who are responsible for complying with the Act face significant economic and other hardships, many of which transfer throughout the economy. Clearly the Act is not working for species or landowners. The Act must be updated and improved to better balance the needs of species and the communities in which we live and work.

Updating and improving the Act's critical habitat provisions would go a long way toward improving the situation for both species and landowners. Under the ESA, at the time a species is listed, the FWS or the NMFS is required to designate critical habitat for the species in an effort to protect habitat essential for conservation. Critical habitat designations subsequently place a variety of regulatory require-

ments on landowners, and result in project prohibitions, delays or mitigation constraints. Ironically, the FWS has conceded that the system governing the implementation of critical habitat under the ESA has forced it to expend significant resources and resulted in little or no conservation benefits to listed species.

NAHB supports the passage of legislation that would update and modernize the ESA by improving critical habitat designations and other decisions made under the Act. H.R. 1299, the Critical Habitat Enhancement Act of 2005, was introduced in the House on March 15, 2005 by Rep. Dennis Cardoza (D-CA) and 16 bipartisan cosponsors. The bill would make significant improvements to the critical habitat designation process and has received the strong backing of NAHB. This common-sense legislation passed the House Resources Committee during the 108th Congress with bipartisan support, and would benefit species, landowners and the Federal agencies charged with enforcing the ESA.

Question 6. Last year, the 9th Circuit issued the so-called Gifford Pinchot decision that invalidated the current definition of destruction or adverse modification under Interior's implementing regulations for the ESA. What impact has the 9th Circuit's Gifford Pinchot decision had on the ability or willingness of private landowners to take voluntary actions to protect species such as developing HCPs?

Response. Simply put, the impact of this decision has been that private landowners are much more wary of investing the time and expense of developing and moving forward with HCPs given the uncertainty developers now face. Let me briefly go into more detail about why this decision is resulting in more uncertainty.

This uncertainty is a result of the fact that *Gifford Pinchot* wrongly equated "conservation" with "recovery." In *Gifford Pinchot,* the 9th Circuit equated the term "conservation" in the definition of critical habitat with the goal of achieving recovery. "Conservation" however, is defined in the ESA to mean "all methods and procedures which are necessary to bring any [listed species] to the point at which [the Act's protections] are no longer necessary."

Thus, Congress clearly did not limit "conservation" to "recovery." Rather, Congress intended "conservation" to reference *all* levels of protection in the Act—ranging from the most narrow, such as "take" (Section 9) and "jeopardy" (Section 7), up to and including full-blown "recovery." "Adverse modification of critical habitat" falls somewhere along this continuum of ESA protection but it is not synonymous with "recovery."

It is appropriate to protect critical habitat to maintain stable species populations to ensure that a species survives which, in turn, is an "essential" component of "recovery." However, it is a far different matter to do what the 9th Circuit did in *Gifford Pinchot,* and rule that Congress intended sweep into "critical habitat" a vast land mass that could, potentially, be used to allow the species to multiply and "recover."

Congress did not intend to accomplish recovery in the ESA through critical habitat. This is not to say that Congress made no provision for the recovery of species. Section 4 prescribes the requirements for "recovery plans" that FWS must develop and implement (after a species' listing) for the conservation and survival of endangered and threatened species. Recovery plans assist FWS in achieving its "principal goal," which is to "return listed species to a point at which protection under the Act is no longer required."

Recovery plans are not regulatory in nature, *i.e.,* they do not impose new restrictions on private parties. Rather, they establish criteria that are used to define "recovery" for a particular species, and use a variety of mechanisms, such as propagation, land acquisition, research, and agreements with Federal agencies or States, to achieve their recovery goal.

Recovery plans place the financial and management burdens of recovery on society as a whole, as opposed to the regulatory burdens of species survival which are placed on landowners through critical habitat designations and the prohibitions of Sections 7 and 9 of the Act. Thus, "a species [sic] long-term protection is properly addressed by a 'recovery plan' developed for the 'conservation and survival' of the species listed as endangered." However, it is clear from the structure of the ESA that recovery plans were never intended to have regulatory effect.

If the terms "adverse modification of critical habitat" or "essential to conservation" are the same as "recovery," then recovery planning will have been transformed into a regulatory program "with the force of law"—in clear contravention of the ESA. So, following this decision, which has called the conservation obligation of critical habitat into question, home builders are loathe to commit to the HCP process knowing that a lawsuit will almost certainly be filed over the regulatory review and protection requirements of critical habitat.

Question 7. What impact, as a whole, has the Gifford Pinchot decision had on private property owners and their ability to complete Section 7 consultations on pending Federal permit or license applications?

Response. One problem here has been that projects that have already undergone a rigorous approval process and subsequently received project approval are now being subject to separate lawsuits that threaten to undue the already agreed upon and approved plan. As I have mentioned previously, there is now tremendous uncertainty regarding pending permits, and their subsequent approval and validity.

RESPONSES BY ALAN FOUTZ TO ADDITIONAL QUESTIONS FROM INHOFE

Question 1. In your testimony you mention that getting your members to participate in the program was a "tough sell." What was the main impediment to having your members participate, and how did you get them to buy into the program? What can we in Congress do to provide willing farmers and ranchers the tools to help listed species recover on private lands?

Response. If the mountain plover had been listed, producers would have been required to maintain critical habitat and drastically change farming practices. With this type of approach, producers would not be willing volunteers. One of the major impediments when it comes to endangered species is that producers do not trust the agencies for a fear of the "big sticks."

The primary need for farmers and ranchers and other small landowners is greater flexibility to be able to help species recover on private lands.

There is no viable program in the ESA for farmers and ranchers to engage in actions that help species or habitat. The only statutory "incentive" program is habitat conservation planning, which is too costly and time consuming for farmers and ranchers, and is designed for one-time development projects rather than ongoing activities like farming and ranching.

Statutory authorization for cooperative conservation programs is important to us, because it provides a shield against citizen suits. Administrative programs such as safe harbors are popular with many of our members, but because they are not authorized by law they are vulnerable to citizen lawsuits.

An effective cooperative conservation program should provide a broad array of incentives for farmers, ranchers and other landowners to choose from. In the case of farmers and ranchers, there are many different types of concerns that they have with respect to their operations. Some are concerned about having to sell the farm or ranch to pay estate taxes: an estate tax credit for having a cooperative conservation agreement in place would be attractive to them. Some have cash flow problems; a cash payment or cost sharing would be attractive. Many others would be satisfied with removal of some ESA restrictions or streamlining ESA procedures. The broader array, the less the aggregate financial cost it is likely to be. One size program does not fit all.

"Jeopardy" standards must also be adjusted for cooperative conservation programs. Currently they focus on short-term "jeopardy," where landowners taking actions to improve habitat may create "harm" in the short term, so that there will be benefits in the long term. Consultations need to see past any short term harm and focus on long term benefits.

Cooperative conservation programs need to be voluntary, provide for "incidental take" like HCPs, provide assurances to the landowners that they will not be required to do more than they agreed to (no surprises), and they also need to insulate landowners from citizen lawsuits when they are acting in accordance with their agreement. Land that is part of an approved cooperative conservation agreement should also be excluded from critical habitat designation, because the "special management" required for critical habitat is being provided by the conservation agreement.

Question 2. Mr. Bean spoke about the need for closer coordination between Department of Agriculture Farm bill programs and endangered species programs in Commerce and Interior. Since you represent the farmers, could you provide some feedback on the idea of using agricultural-related financial incentives specifically to recover and conserve species?

Response. Farm Bureau believes there are a multitude of current working lands programs within USDA that are already supporting species conservation. These programs include the: Environmental Quality Incentives Program (EQIP), Conservation Security Program (CSP), Grasslands Reserve Program (GRP), Farm and Ranch Land Protection Program (FRPP), Wildlife Habitat Incentive Program (WHIP) and Technical Assistance (TA).

In fact, all of these programs have specific eligibility criteria included in the application process aimed at addressing wildlife related concerns.

These programs are benefiting a variety of wildlife species by primarily incorporating the best conservation and management practices on lands under production, while improving water quality and creating or maintaining habitat in or around productive agricultural lands.

While Farm Bureau is more focused on developing working lands programs, we also believe there is an important and integral role for targeted land retirement programs, such as the: Conservation Reserve Program (CRP), Continuous Conservation Reserve Program (CCRP), Conservation Reserve Enhancement Program (CREP), Farmable Wetlands Program (FWP) and Wetlands Reserve Program (WRP).

We believe the current land retirement programs are creating, restoring and protecting several species; however, we believe with additional refinement the programs could do even better and produce even greater environmental benefits. Farm Bureau believes the first goal of Congress, the Department of the Interior and USDA should be to encourage the adoption of best management and conservation practices (*e.g.,* residue management, riparian areas, terraces, etc.) to address the specific and identified resource concern(s). Only when those practices are deemed inadequate in addressing the identified concern(s) should lands be targeted for retirement.

In looking at the CRP and wildlife habitat, we would urge the committee to consider the following:

1) Targeting lands for enrollment where there is wildlife of critical local concern, particularly in circumstances that could lead to regulatory pressures. Landowners should also have assurances that temporary CRP enrollments will not lead to enhanced risk of regulation.

2) A renewed focus on CCRP, which targets smaller parcels of lands, primarily adjacent to waterways.

3) Encouraging and rewarding good management of lands once under enrollment. USDA should work with contract holders on "maintenance management strategies" that collaboratively benefit wildlife and the agricultural community, such as controlled burns, haying and grazing, noxious weed control and establishing adequate food plots. We must reinforce that "enroll and abandon" strategies are unacceptable.

The question should be what financial investment Congress is willing to make in the future and how a focused, reasonable and performance-based strategy should be developed to address specific species concerns on a local and regional basis.

In these times of tight budgets, we all must strive to narrow our focus and direct limited dollars to our highest priorities for wildlife. We would encourage the committee to further discuss:

1) What the proper balance of funding should be for areas addressing endangered/rare/declining species issues versus areas wishing to establish general wildlife habitat?

2) How will USDA better engage local and regional partners in identifying the greatest concerns and priorities, and getting "the biggest environmental bang for the buck?"

3) How can USDA conservation programs and DOI-imperiled species programs better coordinate with each other to achieve common wildlife objectives?

Question 3. It is great to see farmers and others taking steps on their own, outside of financial incentives, to conserve a species, succeed in preventing its listing, and maintain free use of their land. That is a great success story. What would be some legislative steps we could take in reviewing this law that would encourage more proactive conservation practices such as these?

Response. As stated above in response to question no. 1, farmers and ranchers need to have greater flexibility to be able to address species needs through conservation agreements. As currently written, the ESA is too rigid to allow private landowners to take actions to disturb species habitat that are necessary to enhance that habitat. The ESA provides flexibility to address needs of candidate species, like the mountain plover, but once a species is listed, the flexibility is lost.

We believe that a broad array of incentives should be available that allow landowners to choose the one that best fits their need and goals. Such incentives might include direct payments, tax credits or other tax incentives, or the removal of disincentives and restrictions. Incentives might include working landscapes programs that allow a producer to provide habitat enhancements while continuing to conduct agricultural operations, or they might also include a set aside program similar to the Conservation Reserve Program.

That does not mean that Congress would have to enact a lot of new programs. The landowner agreement program could be crafted broadly to provide the flexibility

and innovation necessary to allow private landowners to recover species on their lands. We believe two basic types of programs could be legislated:

Voluntary Landowner Recovery Agreements: This would be a program for listed species similar to the current EQIP or WHIP programs. Rather than legislating a number of new programs, we believe that a simple, broad authorization that provides flexibility to the Secretary and the landowner would be the least complicated way to proceed.

Agreements would be voluntary with landowners and would have to benefit species. The program and agreements would be flexible for both Agency and landowner to allow both to accomplish recovery goals for the species and land management goals for the landowner. Landowners could receive cost share money for habitat improvements, and might also be given assurances that if their actions in furtherance of the program might accidentally harm a listed species, there would be no liability ("incidental take"). "Incentives" could either be direct payments, cost share, tax or other incentives, or the removal of disincentives, such as providing incidental take protection or limiting consultation for actions in furtherance of an agreement. There is a current Interior program for Candidate Conservation Agreements with Assurances that could be extended to cover listed species as well.

Voluntary Critical Habitat Reserve Program: The Critical Habitat Reserve Program would be a voluntary program, similar to the current Conservation Reserve Program. It would establish partnerships with willing landowners or operators either to set aside land (similar to CRP) for species habitat, or to actually manage enrolled lands for species habitat. The latter would be better, because it would benefit the species more as well as allow the landowner to achieve operational goals. There would be annual payments, other incentives such as removal of red tape or lessening restrictions, or possibly cost share for habitat improvements. The legislation would describe contract terms and conditions, provide length of contracts, etc. The program would be limited to privately owned lands designated as critical habitat, simply in order to draw some boundaries and limits on the program. The program would be administered by the Secretary of Interior.

Question 4. Cooperative conservation certainly produces great results and Congress should encourage this type of behavior. In your opinion, does the ESA need an entirely new conservation mechanism or should the administrative programs put in place over the years simply be codified?

Response. We believe that the administrative programs that have been put in place during the past several years deserve to be continued and should be codified. Safe Harbor agreements, Candidate Conservation agreements with Assurances and No Surprises are all very innovative programs. If for no other reason, they should be continued to provide certainty for the people who already use them. They should be codified to give them the explicit authorization and approval to insulate them from lawsuits.

But we also believe that additional authorization is necessary. As innovative as these administrative programs are, they were still cobbled together to fit within the strictures of the current ESA.

Congress should not be bound by the current law in fashioning conservation mechanisms. The law should be changed to fit the programs, not the other way around.

As mentioned above, Congress should explicitly authorize a broad array of landowner incentives that include payments, tax credits and incentives, and removal of disincentives and red tape. It should then authorize a simple program of allowing for voluntary recovery contracts with the Fish & Wildlife Service and National Marine Fisheries Service to accomplish recovery goals and objectives for the different species, using any or all of the incentives that have been authorized.

RESPONSES BY ALAN FOUTZ TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. Given your support for short-term voluntary agreements to protect critical habitat, can you explain how such agreements would ensure the long-term survival of an endangered species?

Response. The Endangered Species Act now requires that the status of listed species be reviewed every 5 years to determine whether the species should be re-classified or de-listed. The 5 year term we suggest for recovery agreements is consistent with that five year status requirement.

One of the problems with the current Act is that once listed, species rarely are de-listed, even if they have met recovery goals. Bald eagles were declared by Presi-

dent Clinton to have been recovered in the late 1990's, but the species has not yet been de-listed.

Question 2. Are there any specific incentives for private landowners that you would like to see included in the Endangered Species Act?

Response. We believe that a broad array of incentives should be available that allow landowners to choose the one that best fits their need and goals. Such incentives might include direct payments, tax credits or other tax incentives, or the removal of disincentives and restrictions. Incentives might include working landscapes programs that allow a producer to provide habitat enhancements while continuing to conduct agricultural operations, or they might also include a set aside program similar to the Conservation Reserve Program.

That does not mean that Congress would have to enact a lot of new programs. The landowner agreement program could be crafted broadly to provide the flexibility and innovation necessary to allow private landowners to recover species on their lands. We believe two basic types of programs could be legislated:

Voluntary Landowner Recovery Agreements: This would be a program for listed species similar to the current EQIP or WHIP programs. Rather than legislating a number of new programs, we believe that a simple, broad authorization that provides flexibility to the Secretary and the landowner would be the least complicated way to proceed.

Agreements would be voluntary with landowners and would have to benefit species. The program and agreements would be flexible for both Agency and landowner to allow both to accomplish recovery goals for the species and land management goals for the landowner. Landowners could receive cost share money for habitat improvements, and might also be given assurances that if their actions in furtherance of the program might accidentally harm a listed species, there would be no liability ("incidental take"). "Incentives" could either be direct payments, cost share, tax or other incentives, or the removal of disincentives, such as providing incidental take protection or limiting consultation for actions in furtherance of an agreement. There is a current Interior program for Candidate Conservation Agreements with Assurances that could be extended to cover listed species as well.

Voluntary Critical Habitat Reserve Program: The Critical Habitat Reserve Program would be a voluntary program, similar to the current Conservation Reserve Program. It would establish partnerships with willing landowners or operators either to set aside land (similar to CRP) for species habitat, or to actually manage enrolled lands for species habitat. The latter would be better, because it would benefit the species more as well as allow the landowner to achieve operational goals. There would be annual payments, other incentives such as removal of red tape or lessening restrictions, or possibly cost share for habitat improvements. The legislation would describe contract terms and conditions, provide length of contracts, etc. The program would be limited to privately owned lands designated as critical habitat, simply in order to draw some boundaries and limits on the program. The program would be administered by the Secretary of Interior.

Responses by Alan Foutz to additional Questions from Senator Chafee

Question 1. I understand that Habitat Conservation Plans (HCPs) are difficult for farmers, ranchers, and other small landowners to utilize for a number of reasons including cost, length of time to complete, and rigidity in terms of being more ideal for one time development or tree-cutting as opposed to ongoing activities such as ranching and farming. In your experience, have any farmers attempted to utilize the HCP concept for their lands?

Response. I am not personally aware of any farmers that have used HCPs on their private lands, but I am told that there are a handful of individual farm HCPs in California and Florida. In some cases, these individual HCPs may have been used because there were no other tools available, or other tools such as Safe Harbor were not known to the farmer.

There is a group of landowners in southern Colorado that has been working on a HCP for the willow flycatcher, but I do not know where their effort stands.

Question 2. What could be done to ensure that HCPs are more accessible to farmers?

Response. You correctly state the main problems with individual farmer HCPs in question no. 1. They are expensive, time consuming, and better suited for one-time development. In addition, with the lawsuits and uncertainty over the effectiveness of the No Surprises policy, farmers cannot be assured that they will not be required

to do more than they agreed to in the HCP. Other issues for farmers and ranchers include the HCP focus on mitigation as the appropriate conservation tool, and the requirement that there be sufficient funding available for implementation of the HCP.

Some thoughts on improving the HCP process to make it more accessible to farmers and ranchers:

a. Current law is fairly rigid in the requirements for an HCP and is very traditional in its implementation of those requirements. The law needs to become more flexible to allow the process to work for farmers and ranchers and small landowners. "Mitigation" and "funding" requirements especially need to be addressed.

b. Change the focus and meaning of the "mitigation" requirement from set-aside to working landscapes. In other words, "mitigation" should be defined in terms of ongoing habitat enhancements instead of set-asides. For one time development, habitat set-asides might be more appropriate because the development is less likely to be able to co-exist with the species and habitat than ongoing farm and ranch activities. Also, one-time development can more effectively set-aside land for mitigation than farmers and ranchers. Farmers and ranchers cannot afford to set aside their land for mitigation, because without their land they cannot operate. The law might emphasize, for example, that Best Management Practices designed to enhance habitat should be deemed sufficient "mitigation."

c. "Low effect" HCPs are provided in regulatory guidance, and the concept should be expanded and applied to farmers and ranchers. Because they involve ongoing activities that have less habitat impact generally than homebuilding or tree cutting, farm and ranch operations should not be subject to the same scientific demands as one-time development projects. In addition, the application and approval process for low-effect HCPs should be streamlined to achieve quicker approval.

d. In order to ease some of the data requirements that are often burdensome to farmers and ranchers and other individual landowners, scientific data from HCPs and other sources should be available to HCP applicants to reduce the likelihood of expensive duplication of effort. Such a requirement (while maintaining appropriate confidentiality) would help make HCPs more affordable for farmers and ranchers.

e. Funding issues—Current law requires assurance of sufficient funding for implementation of an HCP as a condition of approval. The law would have to provide that "funding" could be waived for ongoing habitat enhancement using a working landscapes approach. Another approach would be to provide a grant program to farmers, ranchers and other small landowners for HCP planning and implementation.

f. Land that is enrolled in an HCP should be exempt from critical habitat designation. Critical habitat is defined in terms of land "which may require special management considerations or protection." It is our belief that an HCP already provides that "special management and protection" and should not be included in critical habitat. The same should apply to all cooperative conservation programs.

g. The "No Surprises" policy must be codified to provide landowners with adequate assurances that they will not be required to do more than they originally agreed to do under the HCP. A big concern of farmers and ranchers is that once they enter into an agreement, the government will come back at a later time and tell them they have to do more. An effective "No Surprises" policy is a key for all cooperative incentive programs.

h. To streamline the HCP process, we suggest establishing a one-stop consultation for all a farmer's and rancher's programs that are affected by an HCP. Once this consultation is completed, there should not be any further consultation for any actions taken in furtherance of the HCP.

Question 3. Based on your experience with the mountain plover program in Colorado, are there any other species conservation efforts that you are participating in that have proved beneficial to species in your State or region?

Response. The mountain plover project was the first project of its kind the Colorado Farm Bureau and its members initiated and participated in. Individual farmers and ranchers are the original stewards of the land. Agricultural producers are maintaining and improving habitat to conserve species through normal farming and ranching practices every day.

Perhaps due to the experience with the mountain plover, our members are more willing to enter into other organized conservation programs as well, such as the conservation effort to conserve the greater sage grouse that is currently underway across the West.

Question 4. What types of incentives do you believe need to be provided to farmers in order to ensure habitat for listed species is enhanced on privately owned lands?

Response. We believe that a truly effective incentive program must contain a broad array of incentives for farmers, ranchers and other small landowners to choose from. Farmers and ranchers have different concerns regarding their operations—some are concerned about passing their farm to heirs and payment of high estate taxes, some have cash flow problems, while others are concerned about restrictions placed on their continuing ability to operate.

For that reason, an effective cooperative conservation program should contain: direct payments or cost sharing, tax credits or other tax incentives, and the removal of disincentives or restrictions. One size should not fit all.

But all such programs should have the same core elements. Any incentive program should provide: (1) an effective "No Surprises" policy, (2) incidental take protection, (3) exemption from critical habitat designation, (4) be voluntary with the landowner and (5) flexibility for the landowner.

We believe two basic types of programs could be legislated:

Voluntary Landowner Recovery Agreements: This would be a program for listed species similar to the current EQIP or WHIP programs. Rather than legislating a number of new programs, we believe that a simple, broad authorization that provides flexibility to the Secretary and the landowner would be the least complicated way to proceed.

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In developing landowner incentives, the key is to provide flexibility to allow the Department and the landowner to both achieve their goals.

RESPONSES BY ALAN FOUTZ TO ADDITIONAL QUESTIONS FROM SENATOR MURKOWSKI

Question 1. The prohibitions on taking and the related threat of criminal or civil prosecution are the "big sticks" in the ESA with respect to the treatment of issues that occur on private lands. Many property owners view them with understandable apprehension. Do you see a need or benefit to amending the law to better define the situations in which these "sticks" should actually be used?

Response. Yes. Enforcement activities should be better defined in the Endangered Species Act. Producers' livelihoods are at stake in situations including predation, and while takings are sometimes permitted, the rules and regulations aren't made clear. For this reason, producers are fearful of protecting their livestock from predation and they suffer significant losses as a result.

We request that in cases where species are reintroduced, livestock producers must be held "harmless" for any actions taken by them to protect their private property if it is preyed upon by the introduced predator species.

In addition, the designation of critical habitat could create issues for farms. For instance, the designation could cause farmers to have to drastically change their farming practices rather than participating in a cooperative effort to enhance species habitat.

There are four different areas where "take" and its meaning might be clarified.

a. The definition of "take" is too broad and uncertain. "Take" not includes killing or injuring a species, but also "harming" or "harassing" a species. The meaning of those terms is almost without limit. For example, the legislative history says that bird watching could constitute a "take" in some circumstances. The uncertainty in the definition invites lawsuits against innocent landowners. The definition of what is an illegal "take" needs to be narrowed to activities that actually kill or injure a species, or cause it to be killed or injured.

b. The definition of "take" needs to exclude habitat modification. The Act was never intended to prohibit activities modifying habitat not designated as critical as a "take" absent the death or injury of a member of the species, yet it has been interpreted as such. The administrative definition of "harm" walks a fine line by including actions that affect the breeding, feeding or sheltering of a species, but all it does is create more uncertainty. The civil and criminal penalties are so severe that any uncertainty in the definition of "take" unfairly limits landowners and inhibits otherwise lawful behavior for fear of violating the ESA. The Act should be amended to exclude from the definition of "take" habitat modification where there is no evidence of killing or injuring a member of a listed species.

c. Penalties can be imposed on a person who "takes" a listed species regardless of whether it was intended or not. Interestingly, intent is a requirement for an action against humans, but not for actions against listed species. Intent should be added as a requirement for imposition of penalties for "taking" a listed species. Accidental "taking" of a species in the course of otherwise lawful activities should not result in civil or criminal penalties.

d. Currently, the "taking" of one member of a species constitutes an actionable "take" that can lead to civil or criminal penalties. Granted that in some cases there are only a few remaining members so that taking one would jeopardize the species, but that is not true in the vast number of cases. We suggest that the threshold for "take" violations be amended, or that "incidental take" be permitted for listed species.

Question 2. In your view, would it improve the ESA to include incentives for landowners to manage their lands and activities in ways that are more hospitable to listed species? If so, what kind of incentives do you think might be appropriate?

Response. Over 70 percent of listed species occur to some extent on private lands. About 35 percent of listed species—over 400—live exclusively on private lands. Private landowner cooperation, therefore, is critical to the success of the Endangered Species Act.

The Act is currently enforced through a series of prohibitions and restrictions—negative enforcement that does not help species recovery. A cooperative conservation program where landowners agree to enhance species habitat on their lands provides positive, active management for the species that is much better for the species than the current system. Species benefit more from landowners taking action because they want to, not because they have to. Incentive type programs allow the landowner to deal with the ESA on his/her own terms. Properly implemented incentive programs help Agency and landowner find the middle ground that benefits both species and landowner, providing a "win-win" situation for all.

The ESA would be improved if it included incentives for landowners to manage their lands and activities as related to listed species. However, incentives aren't the Response. alone. Regulations need to be relaxed in order to provide flexibility to producers to enhance habitat. We recommend guaranteed "safe harbor" be offered to private landowners who voluntarily provide habitat for declining, threatened or endangered species, including situations when the landowner wishes to put the land in habitat back under agricultural production.

We support the voluntary participation of agricultural producers in any species recovery program. Any such voluntary effort should be protected by legislation to hold the participant harmless in case of disease, natural predation, or natural disaster which negatively impacts the species in question.

We believe that the goal of any species recovery program should be species recovery, not interference with normal agricultural operations. Each individual operator should be allowed maximum flexibility in adjusting his operation to aid species recovery.

We support incentive payments for conservation of endangered species. We support incentive payments for wildlife conservation only in those areas designated as critical habitat for species survival. Critical habitat areas should be first designated on public lands.

We believe that a truly effective incentive program must contain a broad array of incentives for farmers, ranchers and other small landowners to choose from. Farmers and ranchers have different concerns regarding their operations—some are

concerned about passing their farm to heirs and payment of high estate taxes, some have cash flow problems, while others are concerned about restrictions placed on their continuing ability to operate.

For that reason, an effective cooperative conservation program should contain: direct payments or cost sharing, tax credits or other tax incentives, and the removal of disincentives or restrictions. One size should not fit all.

But all such programs should have the same core elements. Any incentive program should provide: (1) an effective "No Surprises" policy, (2) incidental take protection, (3) exemption from critical habitat designation, (4) be voluntary with the landowner and (5) flexibility for the landowner.

We believe two basic types of programs could be legislated:

Voluntary Landowner Recovery Agreements: This would be a program for listed species similar to the current EQIP or WHIP programs. Rather than legislating a number of new programs, we believe that a simple, broad authorization that provides flexibility to the Secretary and the landowner would be the least complicated way to proceed.

Agreements would be voluntary with landowners and would have to benefit species. The program and agreements would be flexible for both Agency and landowner to allow both to accomplish recovery goals for the species and land management goals for the landowner. Landowners could receive cost share money for habitat improvements, and might also be given assurances that if their actions in furtherance of the program might accidentally harm a listed species, there would be no liability ("incidental take"). "Incentives" could either be direct payments, cost share, tax or other incentives, or the removal of disincentives, such as providing incidental take protection or limiting consultation for actions in furtherance of an agreement. There is a current Interior program for Candidate Conservation Agreements with Assurances that could be extended to cover listed species as well.

Voluntary Critical Habitat Reserve Program: The Critical Habitat Reserve Program would be a voluntary program, similar to the current Conservation Reserve Program. It would establish partnerships with willing landowners or operators either to set aside land (similar to CRP) for species habitat, or to actually manage enrolled lands for species habitat. The latter would be better, because it would benefit the species more as well as allow the landowner to achieve operational goals. There would be annual payments, other incentives such as removal of red tape or lessening restrictions, or possibly cost share for habitat improvements. The legislation would describe contract terms and conditions, provide length of contracts, etc. The program would be limited to privately owned lands designated as critical habitat, simply in order to draw some boundaries and limits on the program. The program would be administered by the Secretary of Interior.

Question 3. Current law allows anyone, even the most radical animal rights or environmental group, to take individual citizens to court for alleged "taking" even where the rationale is extremely flimsy. In your view, has this practice been abused?

Response. We are aware of instances where we believe that it has been abused. In some cases, the ESA has been used to try to achieve other objectives. We have also heard of situations where suit has been threatened and concessions extorted in exchange for dismissing or not filing the lawsuit.

The excessive amount of ESA litigation is one of the biggest challenges facing effective implementation. Too much time and money is spent defending legal challenges, taking away from efforts that could be helping species recovery.

Question 4. What suggestions do you have for providing landowners with an assurance that they are not going to become a victim of this practice sometime in the future?

Response. There are two different aspects to the problem that litigation poses for farmers and ranchers. The first is the issue of direct litigation against them through citizen suits. This can be remedied by requiring that only the Agency can take enforcement actions against private parties. Citizen suits would be limited to suits against the Agency for enforcement, not against the individual.

The second problem arises in the case where suit is filed against an Agency only, but an individual farmer or rancher is the "real party in interest" who will be affected by the outcome. An example might be where the Forest Service is sued for failure to consult before issuing grazing permits in a particular area. The ranchers receive no notice of the suit, and are suddenly notified that they must remove their livestock. This situation can be remedied by requiring that the 60 notice of intent to sue that must be filed prior to suing be noticed to the private parties as well. This requirement might be satisfied by the Department of the Interior posting all such notices on their website in a timely manner.

Question 5. Some outside parties have suggested that we don't need to update or improve the ESA but just need to comply with the existing law and fully fund ESA programs. As representatives of landowners and companies who have to comply with the ESA on a day to day basis, do you agree that the ESA, in its present form, is sufficient?

Response. The experience of farmers and ranchers with the Endangered Species Act strongly suggests that changes in the law are necessary. Of the more than 1300 total species listed under the Act, less than 20 have been recovered and de-listed. For a law that has imposed so many restrictions on farmers, ranchers and other private property owners, and been the subject of so many lawsuits to save and protect species, this result is completely unsatisfactory. The farmers and ranchers who have had to endure these restrictions deserve more for their forbearance.

The ESA has done a good job in putting species on the list. It now needs to also focus on getting species off the list. For this, a new approach is needed. Command and control regulation and land use restrictions are not working. Moreover, they do nothing to actively manage or improve habitat. Focus on land use restrictions as the way to help species ignores the habitat improvement that is necessary for a species to recover, and fails to address the real reasons for a species decline. For example, for all of the land use restrictions against cutting old growth timber in the Pacific Northwest, research finds that the northern spotted owl is still declining. The issue is competition from the barred owl, not habitat loss.

With over 70 percent of listed species on private lands, we believe that the cooperation of private landowners is the key to ESA success. The ESA must turn from a statute of regulation to one of cooperation. With appropriate assistance and incentives, landowners can recover species on their lands.

Another significant problem with the ESA is that it is too inflexible. It contains specific detailed procedures with specific timeframes. It also contains very specific and complete prohibitions against taking, and very narrow exceptions. The only exception is Habitat Conservation Planning, which was designed for one time development of land and not to address ongoing activities such as farming or ranching. Additional flexibility must be built into the Act to allow more cooperative conservation opportunities and also the flexibility needed to make those opportunities available to different private landowners.

Many of the procedures and timelines have not stood the test of time. Court decisions have rendered many procedures obsolete or duplicative. For example, critical habitat was enacted in 1982 as a means of protecting habitat necessary for a species to survive until such time as it could recover. It provided certain Agency discretion as well as specific time deadlines for designation. Subsequent court decisions have interpreted the ESA to protect nearly all habitat as if it were critical, rendering the designation of critical habitat as redundant. Time deadlines have proven unrealistic, and numerous lawsuits have been filed over missed deadlines and failure to designate.

Consultation requirements are another continuing source of litigation. Procedures and time deadlines need to be adjusted to make the process more workable and more meaningful.

Listing is another area where there are problems. The Fish & Wildlife Service has virtually lost any discretion to determine whether a species should be listed. A "not warranted" determination is challenged in court, and if that fails, another suit is filed. The Canadian lynx was not listed until after the third lawsuit. Changes to this procedure need to be made.

Congress also needs to re-think the listing of "distinct population segments" of a species. Using this designation, the Agency can list specific populations of an otherwise healthy species simply on the basis that the specific population might not be healthy. This has led to listing of salmon and steelhead populations in each individual river or tributary on the basis that the population in each river is different. Most salmon are listed under the Act, yet it continues to be served in restaurants. It also leads to listing of marginal populations on the fringes of otherwise healthy populations in other countries. For example, the pygmy owl is plentiful in Mexico, but the northern fringe in Arizona was listed. Gray wolves are plentiful in Canada and Alaska, yet endangered in the lower 48.

There are several other areas that need to be addressed in amendments to the Act. Additional funding will not solve the problems—it will only exacerbate the problems resulting from flawed procedures. More money will perpetuate the problems with critical habitat, consultation, listing and landowner restrictions without solving them.

Question 6. In your testimony you mention that the Colorado program never would have happened if the mountain plover had already been listed. What did you

mean by that, and what, in your opinion, has to be changed in the Endangered Species Act in order to have the same type of program for listed species?

Response. If the mountain plover had already been listed, producers would have been required to maintain critical habitat and drastically change farming practices. The rigid prohibitions against "take" and the consultation requirements would have made it virtually impossible to devise a program as flexible as the one that we did.

In addition, with this type of rigidity, producers would not be willing volunteers. One of the major impediments when it comes to endangered species is that producers do not trust the agencies for a fear of the "big sticks." The ESA needs to provide additional flexibility to allow the same type of approach for listed species as Colorado Farm Bureau and its partners were able to use for the not-yet-listed mountain plover.

Question 7. How has the Colorado program benefited the mountain plover?

Response. The resulting cooperative effort allowed for the successful study of the mountain plover. More than 300,000 acres of private land were allowed to be studied by Colorado Farm Bureau members. The Colorado Natural Heritage Program, a non-profit, non-regulatory organization, and CSU conducted the research in cooperation with the U.S. Geological Survey and the U.S. Fish and Wildlife Service.

The results were very different than the assumptions that had been made about the mountain plover. Rather than cultivated land being harmful to the species and encroaching on the plover's habitat, research indicated that Mountain Plovers do in fact occupy and nest on cultivated fields and often prefer cultivated fields to short grass prairie. Some tillage and planting activities do disturb nests, while other activities do not. However, the research also found that fledging success rates are roughly the same on cultivated fields as on native short grass prairie. Had the land use restrictions proposed at the time of the listing proposal gone into effect, the effects would have been to decrease plover habitat and fledging rather than helping it recover.

Due to the cooperative efforts by the U.S. Fish and Wildlife Service, State of Colorado and landowners, the Mountain Plover was not added to the Endangered Species list.

Landowners are continuing to allow non-governmental biologists to flag nests on fields prior to cultivation and are taking it upon themselves to avoid destroying nests by driving around them. Research on the plover continues as well as a very aggressive landowner education and outreach effort.

RESPONSES BY MARSHALL P. JONES JR. TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. Your testimony included lots of examples of how the current incentive structure has experienced tremendous success. You specifically cite Oklahoma as one of those successes. At our previous hearing, Judge Manson discussed how litigation is a burden on the Service. Has litigation had an adverse impact on the Service's efforts to promote voluntary incentive programs? Have judicial decisions undermined or called into question the existence of some of your practices? Are resources being diverted from these programs to help pay for litigation?

Response. A Congressionally-set ceiling on spending related to listing and critical habitat actions limits the impact of the listing and critical habitat litigation workload on other programs that promote voluntary conservation actions such as Endangered Species Grants, Recovery, and Candidate Conservation. However, judicial decisions can continually change our priorities within the listing program and some decisions result in the use of program funds to pay attorney fees. Attorney fees may be available to successful litigants under either the ESA citizen suit provision or the Equal Access to Justice Act, depending on the cause of action underlying the lawsuit. Awards payable under the Equal Access to Justice Act may result in the payment of fees from program funds.

Question 2. Absent specific statutory language to do so, the Fish and Wildlife Service has put into place several programs to try to encourage private landowners to conserve and recover endangered and threatened species on their lands. In the experience of the Service, what have been some of the reasons for non-participation on the part of private landowners? What tools can Congress provide to ensure that these programs thrive and are successful?

Response. Most of these volunteer programs are relatively new and many landowners appear to be unaware of their existence. Continued Congressional support for tools identified in the President's annual budget that assist the Service to work with other Federal agencies, State and local government agencies, non-govern-

mental organizations, trade organizations and other partners to inform the public of these programs and their benefits, and assist landowners who are interested in participating, will go a long way to ensure these programs are effective and are more widely used.

Question 3. Clearly the voluntary conservation programs, such as the Partners for Fish and Wildlife program, have been hugely successful in establishing habitat for all kinds of species, endangered and non-endangered alike. In the Service's experience, are programs like this superior to the designation of critical habitat and does the establishment of critical habitat interfere with the success of these programs? Is it the practice of the service to exclude lands covered by an incentive program from critical habitat designation?

Response. In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species. The Service addresses the habitat needs of listed species through other conservation partnerships and programs, such as the Landowner Incentive Program. We have had numerous instances of landowners with ongoing cooperative efforts who have threatened to cease cooperation and their conservation efforts if their lands were designated as critical habitat. The Service regularly excludes lands from critical habitat designations pursuant to section 4(b)(2) of the ESA if they are covered by a conservation program in which the benefits of excluding the lands outweigh the benefits of including the lands in the designation.

RESPONSES BY MARSHALL P. JONES JR. TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. In addition to protecting habitat for endangered species, in your testimony you state that the Fish and Wildlife Service has incentive programs for invasive species. You cited the Private Stewardship Grants and gave the example of a project in Hawaii that is removing invasive species and restoring native plants. Are a large percentage of those grants used for invasive and native species control? What other incentives does the Fish and Wildlife Service have for controlling invasive species and restoring native species?

Response. Approximately one-third of the fiscal year (FY) 2004 Private Stewardship Grant Program awards were provided for projects that specifically addressed exotic and invasive species control or removal. Many of the financial assistance programs offered through the Service, such as Partners for Fish and Wildlife, provide funding to address exotic and invasive species control. In addition, the Service has staff located in the Aquatic Invasive Species Branch in Washington, as well as invasive species coordinators for National Wildlife Refuge lands, dedicated to addressing exotic species concerns and the control of invasive species.

Question 2. Is there more that the Administration could do to encourage private landowner incentives for conservation of listed species, without legislative changes to the Endangered Species Act? If so, what would they be?

Response. The Administration fully supports conservation incentives for private landowners through the Cooperative Conservation Initiative, a host of Department of the Interior financial assistance programs, and various landowner conservation tools (*e.g.,* Habitat Conservation Plan (HCP), Safe Harbor Agreement (SHA), Candidate Conservation Agreement with Assurances (CCAA), and conservation banking) designed to foster citizen stewardship through voluntary conservation activities. These incentive programs do not require legislative changes to the Endangered Species Act and have proven to be both popular and effective conservation tools. To further encourage landowners, we are continuously identifying ways to make the public more aware of these programs and to streamline the processes involved to make it even easier for landowners to use them.

RESPONSES BY MARSHALL P. JONES JR. TO ADDITIONAL QUESTIONS FROM SENATOR CHAFEE

Question 1. One of the concerns expressed in relation to Federal incentives for species protection on private lands is the length of time and financial burden placed on landowners in working with the Service to develop and implement Habitat Conservation Plans and other conservation agreements. How does the Fish and Wildlife Service tackle these issues when encouraging private landowners, and particularly smaller landowners, to utilize voluntary conservation measures for species protection?

Response. The Service encourages private landowners to work with us at an early stage in their project so we can assist them in selecting the appropriate program (*e.g.,* Habitat Conservation Plan (HCP), Safe Harbor Agreement (SHA), Candidate Conservation Agreement with Assurances (CCAA), and conservation banking), identifying grant funding opportunities for their particular situation, and informing them of the processes involved. The Service also provides technical assistance to landowners to design conservation activities and obtain grants that provide financial assistance for completing the planning process; this can be particularly helpful to smaller landowners.

Question 2. In the development and implementation of Habitat Conservation Plans (HCPs) and other conservation agreements on private lands, how does the designation of new critical habitat for species impact conservation agreements already in place?

Response. It has been our view that areas not in need of special management considerations or protections are outside the definition of critical habitat. For that reason, we exclude from critical habitat areas that adequately manage for the species concerned. This has allowed the Service to exclude from critical habitat lands covered by HCPs in effect or in draft form on the date of the final critical habitat designation, starting with the final rule designating critical habitat for the coastal California gnatcatcher in 2000.

Question 3. In your testimony, you mention the future potential for conservation banks to protect habitat for species on a broader-scale and a more consistent basis. Under what current Fish and Wildlife Service programs would private landowners purchase mitigation credits to go toward a conservation bank? How do conservation banks ensure habitat protection for species in a more comprehensive fashion?

Response. Private landowners seeking incidental take authorization for listed species through the Endangered Species Act (ESA) section 7 consultation or section 10 incidental take permits for HCPs may be eligible to purchase mitigation credits in a conservation bank. Whenever a conservation bank will achieve equivalent or greater benefits for the species, private landowners are encouraged to purchase credits in a conservation bank rather than attempt to provide mitigation on their own lands. Conservation banks are generally large mitigation sites that are well protected, well managed, and well funded; thus they provide increased protection for species and cost much less per acre to protect and manage than smaller, single project mitigation sites.

Question 4. Many Habitat Conservation Plans (HCPs) are designed to last long time periods, some as long as 50 to 99 years. If during that time the science suggests that a species is in decline, how would adaptive management be used to ensure that HCPs are reviewed and altered to protect species? What happens if an HCP is not working to protect species even after changes are made?

Response. In conjunction with adaptive management, species monitoring is an important component of HCPs. Typically, triggers or thresholds are established for monitoring that, if reached, would result in an appropriate management response to prevent a significant decline in species from occurring. However, if a significant decline is detected, HCPs allow for additional changes in management through changed circumstances. These changes can include those detailed in the HCP or additional changes as agreed to by the permittee and the Service. In addition, the Service has issued Incidental Take Permit Revocation Regulations that describe circumstances when permits may be revoked, which are codified at 50 C.F.R. Part 117.

Question 5. How does the National Environmental Policy Act or NEPA process come into play as the Service develops voluntary conservation agreements for private properties?

Response. Under NEPA and section 10 of the ESA, the development of an appropriate NEPA document and the opportunity for public participation is a mandatory element of Habitat Conservation Plans, Safe Harbor Agreements, and Candidate Conservation Agreements with Assurances. For programmatic plans/agreements, there is no need for individual landowners, who become participants through certificates of inclusion, to prepare a separate NEPA document. At a minimum, plans or agreements and associated permits are noticed in the Federal Register for public comment for 30 days. Large, complex, or programmatic plans or agreements generally are noticed for 60 to 90 days. Also, the Service often provides opportunity for public participation through public meetings, websites, and other avenues of input throughout the planning stages.

RESPONSES BY MARSHALL P. JONES JR. TO ADDITIONAL QUESTIONS FROM SENATOR CLINTON

Question 1. According to a study by the Department of the Interior, in 1991, 24 million Americans took trips for the express purpose of viewing and photographing wild birds. They spent $2.5 billion on trip-related expenses, including $1.5 billion on food and lodging. ESA listed birds, such as the whooping crane and the condor, are a huge tourist draw, as are gray wolves in Yellowstone National Park and red wolves in North Carolina. How can the public and private sectors work together to increase economic benefits from eco-tourism in communities that are home to rare species?

Response. Outreach and education tasks, listed in nearly every recovery plan, are used to publicize efforts to provide viewing and enjoyment opportunities, highlight the benefits of viewing opportunities to local communities, and inform communities about potential partnerships. Using incentive and partnership programs and technical assistance, along with effective outreach, the public and private sectors can work together to identify and develop viewing or enjoyment opportunities for the public that will cause minimal impact on rare species and their environments. Examples of successful public outreach include festivals celebrating the whooping crane, Karner blue butterfly, and Kirtland's warbler.

RESPONSES BY MARSHALL P. JONES JR. TO ADDITIONAL QUESTIONS FROM SENATOR LAUTENBERG

Question 1. A bird species that migrates through New Jersey, the Red Knot, is in serious trouble. We used to have 100,000 of these birds stop in the Delaware Bay on their way up from the tip of South America. Now we have only about 13,000. Do you think the Red Knot deserves an emergency listing under the Endangered Species Act?

Response. The Service has longstanding concern over the status of the Atlantic flyway population of the red knot. From 1999 through 2004, we provided funding (including $117,000 in Candidate Conservation funds and $230,000 in migratory bird funding) to the State of New Jersey's Endangered and Nongame Species Program (NJENSP) to monitor and conduct research on red knots, including studies on their arctic breeding grounds, their wintering grounds on Tierra del Fuego, as well as the important migratory stopover in Delaware Bay. We provided $25,000 to NJENSP in fiscal year (FY) 2004 to conduct a comprehensive status assessment of the red knot and provide the Service with a written document including the data collected over the previous years. This document would assist the Service in making a determination on the status of the species under the ESA.

In July 2004, the Service initiated a status review for the Atlantic flyway population of the red knot through our internal candidate assessment process. In the course of that status review, we have been performing a rigorous, critical analysis of the best available scientific and commercial information. We will use that analysis to make a determination of whether listing the red knot as an endangered or threatened species is warranted.

In August 2004, the Service received a petition to emergency list the Atlantic Flyway population of the red knot as endangered under the ESA. On September 10, 2004, we sent a letter to the petitioner explaining that information presented in the petition and within our files did not demonstrate that the red knot was at immediate risk of extinction or that potential threats to the Atlantic coast population were so severe that the standard listing process would be insufficient to prevent extinction. We further notified the petitioner that we would consider the petition according to our normal listing process in fiscal year (FY) 2005. The Service recently received two additional petitions requesting emergency listing for the red knot, and we are currently evaluating the information in those petitions to determine if emergency listing is warranted.

Question 2. How does the U.S. Fish and Wildlife Service (FWS) plan to address the backlog of endangered species listings and critical habitat designations if its budget gets cut?

Response. The listing budget has increased 31.5 percent, or $3.8 million, from fiscal year (FY) 2004 to fiscal year (FY) 2005, with an increase of over $2.2 million in the fiscal year (FY) 2006 request. The fiscal year (FY) 2004-2005 increase includes $1.5 million for listing (46 percent), and $2.3 million for critical habitat (26 percent). These increases also include salary adjustments, cost-of-living increases, and other uncontrollable costs such as litigation support. The Service expects to make significant progress in addressing the petition backlog in fiscal year (FY) 2005

and is scheduled to initiate or complete petition findings for 24 of the 56 outstanding listing petitions.

RESPONSES BY MARSHALL P. JONES JR. TO ADDITIONAL QUESTIONS FROM SENATOR MURKOWSKI

Question 1. Section 9 of the ESA, along with implementing regulations promulgated by the Agency, use an expansive definition of a "taking" of a listed species to include harm, harassment, and activities that change "essential behavior" or disrupt behavior. If a landowner discovers a listed species on his property, what assurances can the Federal agencies provide the landowner that he or she is free to engage in ordinary uses of the land without being exposed to takings claims and possible prosecution?

Response. The decision to include "harm" and "harass" in the definition of "take" was made by Congress, and the Service's regulations seek to explain what these terms mean. The assurances provided to a landowner depend on the activities he or she proposes to engage in on their land and the effects those activities may have on listed, proposed, or candidate species. A Habitat Conservation Plan (HCP), Safe Harbor Agreement (SHA), Candidate Conservation Agreement with Assurances (CCAA), or some combination of these three programs can generally cover take of any listed species or species that may be listed in the foreseeable future.

Question 2. It is my understanding that efforts to provide administrative mechanisms designed to offer such assurances have been struck down by Federal courts as being inconsistent with the ESA—what changes are needed in the statute so that needed landowner assurances can be provided?

Response. The Service's No Surprises policy was challenged in court, however it was not struck down. The permit revocation regulations related to the No Surprises policy were vacated by the court on procedural grounds, and the Service was ordered to reconsider the permit revocation regulations in relation to the No Surprises policy. The Service promulgated new permit revocation regulations as instructed by the court. No changes were made to the No Surprises policy and these assurances are available to landowners.

Question 3. Does the FWS have any programs that expedite the consideration of HCPs proposed by small landowners?

Response. Low-effect HCPs are essentially expedited HCPs. Projects that qualify as low-effect HCPs are those that have relatively minor or negligible impacts on federally listed, proposed, or candidate species, and minor or negligible effects on other environmental values or resources and can be categorically excluded under NEPA. Programmatic or umbrella-type HCPs that allow small landowners to participate through certificates of inclusions, such as county-wide or state-wide HCPs, are also a form of expedited HCP that small landowners can utilize.

Question 4. On average, how long does it take FWS to review and approve an HCP once it has been submitted for approval.

Response. The amount of time it takes to develop a HCP varies greatly depending on its size, complexity, number of applicants, and other factors. Low-effect HCPs generally take a few months. Large, regional plans can take years to develop. Once an application is submitted to the Service along with a final draft HCP, processing times range from about 4 months to a year depending on the size and complexity of the plan.

RESPONSES BY ROBERT J. OLSZEWSKI TO ADDITIONAL QUESTIONS FROM SENATOR IHOFE

Question 1. In your testimony, you refer to lots of land purchase, conservation easements and other Federal land management agreements. Do you have any suggestions for ways in which we can include landowner incentives without ceding private property to government or other third party entities?

Response. Conservation easements and safe harbor agreements both fulfill a strong role without ceding overall property rights to the government or some other organization. We also cooperate with third parties often before a species is listed to help understand and provide habitat needs this should also be encouraged financially.

RESPONSES BY ROBERT J. OLSZEWSKI TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. In your testimony, you cite many examples where your company has entered in to Habitat Conservation Plan (HCPs) agreements under the Endangered Species Act. There is concern that even when adaptive management is incorporated in plans, it is often unclear if monitoring and information is affecting management. Do you use adaptive management practices in your HCPs? If so, how do you translate adaptive management practices into management on the ground? What kind of monitoring are you doing of the endangered species under your HCPs?

Response. Adaptive management should first be defined early in the HCP process as clearly as possible. Landowners need as much certainty as possible to enter the process and without clearly defining the implications of incorporating a reasonable approach to adaptive management in the HCP "up-front" this will also potentially discourage committing to the HCP process. However, if done thoughtfully, adaptive management can allow revisiting the science behind the HCP as more is learned. It should be a process that allows us to confirm, learn and refine our assumptions as the HCP moves forward. It is also important to remember that we often are measuring the habitat our HCPs provide, just as much or more than the actual "count" of endangered or threatened species.

Question 2. What would you do if you found that the HCP is not working to protect the species? Many HCPs are designed to last long time periods, some as long as fifty years. If during that time the science suggests that a species is in decline, would you agree that the HCP should be reviewed and changed?

Response. This has been covered at least partially by the answer to the previous question no surprises is critical to the landowner and we need to define the limits of the potential realm of where an adaptive management program might take us in the future. Certainly, management activities might be modified by learnings subsequent to the signing of an HCP agreement. We should also recognize that there may be instances where an outside impact appears and a landowner may have no real control over the situation the spread of the barred owl in the Northern Spotted Owl habitat of the Pacific Northwest provides a current day example.

Question 3. Are there any specific incentives for private landowners that you would like to see included in the Endangered Species Act?

Response. Please refer to July 13 testimony and answers in a number of questions above.

RESPONSES BY ROBERT J. OLSZEWSKI TO ADDITIONAL QUESTIONS FROM SENATOR CHAFEE

Question 1. How have the characteristics of your land ownership benefited the formation of Habitat Conservation Plans (HCPs) for endangered species on Plum Creek properties?

Response. Much of Plum Creek's property in the West is situated in a "checkerboard" ownership pattern intertwined with Federal lands. These Federal lands often provide major habitats for endangered and threatened species and we are significantly impacted by this unique ownership situation. We also have some ownership in large, contiguous tracts that allows us to think of areas from the perspective of a large "landscape."

Question 2. On average, what has been the length of time and cost of HCPs developed for species protection on Plum Creek properties?

Response. Generally, HCP development takes somewhere around 2-3 years, and the costs of developing these HCPs are in seven figures. Of course, this can vary with the complexity of the specific project.

Question 3. Would you elaborate on ways in which the Habitat Conservation Planning process could potentially be streamlined to encourage their utilization by more private landowners?

Response. Please refer to July 13 testimony and recommendations regarding the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) triggers which considerably slow the process. We also add that working with overlapping agencies in the USFWS and the NMFS adds major complexity and some inefficiency to the program.

Question 4. As the nation's largest private timberland owner, Plum Creek owns properties in many different regions of the country, all with diverse views and geographic challenges in relation to the protection of endangered species. How does the

process or formulating HCPs and other conservation agreements differ based on land management practices and views pertaining to the ESA in various regions of the U.S.? For example, how would your company go about habitat protection of listed-species in the West versus a similar situation in the New England region?

Reponse. Approaches to endangered species management across the country vary and that is appropriate based on specific species biology and ownership patterns. Different approaches allow landowners and the agencies to pull a variety of "tools from the tool box" to deal with varied situations. We have some Plum Creek HCPs in the West and South, yet we have participated jointly in a statewide HCP effort to protect the Karner blue butterfly in Wisconsin with many partners. Safe Harbor Agreements have allowed many private non-industrial landowners in the South to participate appropriately in protecting red-cockaded woodpeckers on their properties. These are but a few examples of highly varied approaches they should continue to be encouraged and expanded rather than constrained by negative thinking.

Question 5. Several of Plum Creek's HCPs have met with controversy from the beginning. In your opinion, what is driving these concerns?

Response. Unfortunately, some different parties have different goals or motives associated with the HCP program. At least some members of the environmental community appear to try to use the process to hold up land management activity, rather than blending these activities with the protection of endangered and/or threatened species, or often actually improving habitat through forestry operations associated with an HCP.

RESPONSES BY ROBERT J. OLSZEWSKI TO ADDITIONAL QUESTIONS FROM SENATOR MURKOWSKI

Question 1. The prohibitions on taking and the related threat of criminal or civil prosecution are the "big sticks" in the ESA with respect to the treatment of issues that occur on private lands. Many property owners view them with understandable apprehension. Do you see a need or benefit to amending the law to better define the situations in which these "sticks" should actually be used?

Response. We believe "take" has been fairly well-defined by a variety of legal cases. Take is also appropriately defined by the fact-specific issues with regard to each listed species.

Question 2. In your view, would it improve the ESA to include incentives for landowners to manage their lands and activities in ways that are more hospitable to listed species? If so, what kind of incentives do you think might be appropriate?

Response. Please refer to specific comments in the July 13 testimony. Section 6, LWCF, Legacy Program funding could all be helpful in this area. Once again, the encouragement of creative approaches "outside the box" such as statewide safe harbor agreements should be strongly expanded and encouraged.

Question 3. Current law allows anyone, even the most radical animal rights or environmental group, to take individual citizens to court for alleged "taking" even where the rationale is extremely flimsy. In your view, has this practice been abused?

Response. In our view, this is not the major concern or issue with ESA Reauthorization and we would not recommend a high priority here.

Question 4. What suggestions do you have for providing landowners with the assurance that they are not going to become a victim of this practice sometime in the future?

Response. Congress should move to codify the "no surprises" policy along with safe harbor.

Question 5. Some outside parties have suggested that we don't need to update or improve the ESA but just need to comply with the existing law and fully fund ESA programs. As representatives of landowners and companies who have to comply with the ESA on a day to day basis, do you agree that the ESA, in its present form, is sufficient?

Response. Please refer to July 13 testimony and response to (3) in the first section above.

Question 6. In your testimony, you noted that habitat conservation plans (HCPs) are not easy to complete and that "The commitment is expensive, time-consuming and requires us to open our operations to public scrutiny in an unprecedented fash-

ion." From Plum Creek's experience, what changes to the Act should be made to reduce the burdensome costs and time-commitments required in developing HCPs?

Response. Stronger incentives are needed in many instances there is simply not enough reason for a landowner to take on the burdens of an HCP for it to pay off. Additional Section 6 funding would be helpful, along with streamlining of the process from a NEPA and NHPA perspective.

RESPONSES BY LARRY WISEMAN TO ADDITIONAL QUESTIONS FROM SENATOR CHAFEE

Question 1. In your testimony, you mention the importance of statewide and region- or species-specific Habitat Conservation Plans? Would you elaborate on the benefits of these newly emerging approaches for species protection by smaller timber landholders?

Response. Creating an umbrella agreement that can potentially cover all family forest owners in a region provides an opportunity to participate. The process is too lengthy and expensive for many forest owners to undertake individually.

Question 2. You mentioned the creation of private markets as a way to encourage forest owner conservation. What are some changes that could be made to the ESA or other statutes that would most effectively facilitate the creation of private markets for species protection?

Response. Formally recognize the importance and add language for conservation banking of T&E species (this was done for wetlands banking under section 404 of the Clean Water Act Swamp-Buster provisions).

Question 3. Regulatory uncertainty seems to be a significant barrier to species conservation. To this end, are there specific improvements that could be made to existing programs or ESA itself that you believe would have the most benefit and should be high priorities for the Subcommittee?

Response. Expand the ESA to formally recognize tools like Safe Harbor and Candidate Conservation Agreements with Assurances. Court challenges of the HCP "No Surprises" policy have shaken landowner confidence.

Streamline the paperwork and process of providing regulatory assurances for small forest owners (< 5,000 acres).

Increase FWS emphasis on species that are recoverable. Create a program similar to PSGP to support use of Candidate Conservation Agreements with Assurances. It is much cheaper to keep species off the ES list than to try and get them de-listed.